SUPREME COURT, U. S.

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No. 1143

# Supreme Court of the United States

OCTOBER TERM, 1964

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THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellants,*

*v.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

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## JURISDICTIONAL STATEMENT

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May 1965

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## JURISDICTIONAL STATEMENT

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Appellants The Baltimore and Ohio Railroad Company *et al.* (listed in Appendix E hereto, p. 179a, *infra*) appeal from a judgment of the United States District Court for the Southern District of California, which set aside orders of the Interstate Commerce Commission entered in the proceeding bearing its docket number 31503 and subnumbers, known as the *Transcontinental Divisions Case.*

## OPINIONS BELOW

The opinion of the District Court (R. 825) is reported at 238 F. Supp. 528 and is set forth in Appendix A hereto, pp. 1a-21a, *infra*. The reports of the Interstate Commerce Commission (R. 18, 348) are reported at 321 I.C.C. 582 and 322 I.C.C. 491. These reports and accompanying orders (R. 120, 123, 408) are set forth in Appendix C hereto, pp. 25a-176a, *infra*.

## JURISDICTION

This action was begun by a complaint filed in the United States District Court for the Southern District of California, Central Division, under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-25 and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, praying that orders of the Interstate Commerce Commission be set aside. The judgment of the District Court (R. 880), set forth in Appendix B hereto, pp. 22a-23a, *infra*, was dated February 17, 1965, and was entered on February 18, 1965. These appellants filed their notice of appeal in the District Court on March 15, 1965. The jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. § 1253. *New England Divisions Case*, 261 U.S. 184 (1923); *Baltimore & O.R.R.* v. *United States*, 298 U.S. 349 (1936).

## STATUTES INVOLVED

Sections 1(4) and 15(6) of Interstate Commerce Act, 49 U.S.C. §§ 1(4), 15(6), and Sections 8(b) and 10(e) of the Administrative Procedure Act, 5 U.S.C. §§ 1007 (b), 1009(e), are set out in Appendix D hereto, pp. 176a-178a, *infra*.

The provision of Section 15(6) of the Interstate Commerce Act most particularly involved reads:

> "In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall

give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

## QUESTIONS PRESENTED

This appeal arises from a proceeding before the Interstate Commerce Commission in which there were at issue the divisions of joint rates for the carriage of freight between the eastern, midwestern and far western parts of the United States.

Three principal groups of railroads were involved, *i.e.*, (1) railroads operating in the eastern part of the United States, intervening defendants in the court below, which are the railroads filing this Jurisdictional Statement (Eastern carriers), (2) railroads operating in the midwestern states, also intervening defendants below, which have filed a separate notice of appeal from the judgment of the District Court (Midwestern carriers), and (3) railroads operating in the eleven Mountain-Pacific states, which were plaintiffs below and are named as appellees here (Mountain Pacific carriers). Some 300 railroads in these groups were parties to the proceeding before the Commission.

The Commission found existing divisions of joint rates unjust, unreasonable and inequitable and pre-

scribed for the future divisions that it found would be just, reasonable and equitable.

The questions presented are these:

1. Whether the court below erred in holding that the Commission is required by Section 15(6) of the Interstate Commerce Act to make findings as to each of the factors set forth therein with respect to each individual railroad in the contending groups of carriers.

2. Whether the court below erred in holding the Commission's orders invalid on the ground that the Commission is required by Section 15(6), and failed, to make findings as to the amount of revenue, in terms of dollars, required by each group of carriers, the financial effect of the Commission's orders in terms of dollars upon each group of carriers, and the extent to which the new divisions prescribed will produce for each group of carriers the amount found to be required.

3. Whether the court below erred in holding the Commission's order invalid on the ground that the Commission is required by Section 15(6), and failed, to make findings as to the amount of revenue, in terms of dollars, required by each individual carrier, the financial effect of the Commission's orders in terms of dollars upon each individual carrier, and the extent to which the new divisions prescribed will produce for each carrier the amount found to be required.

4. Whether the Commission was bound under Section 15(6) to make any findings in addition to those it did make to show that it gave due consideration to the revenue needs of the carriers concerned for all transportation services, including needs represented by passenger deficits.

5. Whether the Commission can be required to find the dollar amounts of revenue needed by each contending group of carriers, the dollar amount of revenue affected by divisions prescribed and the revenue needs and effect on each individual carrier when, in nine years of hearings, testimony, documentary evidence and briefs, in the course of which all contesting groups of carriers sought to prove their right to relief, the group of carriers challenging the Commission's order did not suggest the need for such findings but made the suggestion only in a petition for reconsideration of the Commission's initial decision.

6. Whether the Commission's findings as to the relative costs of the groups of carriers contesting the interterritorial divisions before it were rational, adequate and supported by substantial evidence on the record considered as a whole.

7. Whether any alleged infirmities in the Commission's reports and orders were prejudicial to the appellees.

## STATEMENT

### Origin and Nature of the Proceedings Before the Interstate Commerce Commission

These appellants are railroads, the Eastern carriers, that operate in Eastern Territory (also known as Official Territory), which is the part of the United States roughly east of Chicago and St. Louis and the Mississippi River and north of the Ohio River and Norfolk, Virginia. Their interest in this case concerns the prescribed East-West divisions of joint rates for the carriage of freight between the territory they serve and points in Transcontinental Territory, which comprises all of five far western states and parts of three

others, and Montana.[1] The present basis of these transcontinental divisions has existed since 1922 when it was established by agreement between the carriers involved. (App. p. 38a). After negotiating for seven years over these divisions the appellants in 1954 filed a complaint with the Interstate Commerce Commission alleging that the existing divisions were unjust, unreasonable and inequitable and asking that the Commission exercise its authority under Section 15(6) of the Interstate Commerce Act and prescribe lawful divisions for the future.[2]

The filing of the complaint led to the filing of various cross-complaints and related complaints with the result that the proceedings before the Commission ultimately involved the lawfulness of these divisions of joint rates:

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[1] Transcontinental Territory lies generally west of Montana, Salt Lake City, Albuquerque and El Paso and thus includes all of Arizona, California, Nevada, Oregon and Washington and parts of Idaho, New Mexico and Utah. Transcontinental Territory and a grouping known as Intermountain Territory together make up the larger far western rate territory known as Mountain-Pacific Territory. The latter lies generally west of the Dakotas, Cheyenne, Denver, Albuquerque and El Paso and thus includes all of Arizona, California, Idaho, Montana, Nevada, Oregon, Utah and Washington and parts of Colorado, New Mexico and Wyoming. The Commission's order affected only divisions relating to Transcontinental Territory and Montana in Intermountain Territory, but the far western roads are referred to both as Mountain-Pacific and Transcontinental lines, and the former designation will ordinarily be used herein.

[2] Section 1(4) of the Interstate Commerce Act imposes upon every common carrier by rail the duty to establish just, reasonable and equitable divisions of joint rates. Section 15(6) empowers the ICC to determine after hearing whether divisions are unjust, unreasonable and inequitable and, if they are so found, to prescribe lawful divisions for the future.

(1) The primary divisions east and west of the primary divisional breakpoints (*e.g.*, Chicago, Peoria and East St. Louis, Illinois) of joint rates covering traffic between Eastern Territory and Mountain-Pacific Territory. This was an issue as to how the joint rates for the carriage of freight between these territories should be divided as between the Eastern carriers on the one hand and all carriers west of the primary breakpoints on the other. (App. pp. 27a-28a).

(2) The basic primary division of joint rates covering traffic between Midwestern Territory and Transcontinental Territory and Montana. This was an issue as to the division of joint rates between the Midwestern group of carriers on the one hand and the Mountain-Pacific group of carriers on the other and did not involve joint rates for the movement of freight to or from Eastern Territory. (App. pp. 28a-29a).

(3) The division as between the Midwestern and Mountain-Pacific carriers of the primary western divisions of the joint rates covering traffic between Eastern Territory and Mountain-Pacific Territory in those instances in which both Midwestern and Mountain-Pacific carriers participated in the haul west of the primary breakpoints. (*Ibid.*)

These appellants are concerned here only with the primary divisions, as between them and all carriers west of the breakpoints, of the joint rates between Eastern Territory and Transcontinental Territory and Montana. (Although the issues before the Commission encompassed all Eastern-Mountain-Pacific traffic, the Commission's orders covered, in the West, only the somewhat smaller Transcontinental Territory plus Montana.) They have no interest in the subdivision

of the joint rates to which they are parties as between the Midwestern and Mountain-Pacific carrier groups or in the prescribed divisions of joint rates between Midwestern Territory and Transcontinental Territory.

Somewhat more than 300 railroads, parties to the joint rates being divided, were parties to the proceeding before the Commission. The case was tried as an interterritorial case, following the procedure used ever since Section 15(6) was added to the Interstate Commerce Act in 1920, as described in the case decided in this Court as the *New England Divisions Case,* 261 U.S. 184 (1923). Under this procedure only the basic divisions as between groups of carriers are considered and not the subdivisions of particular carriers within those groups. This procedure was not imposed by the Commission but was established by the parties themselves in response to the practicalities of the situation, which were recognized by this Court in the *New England Divisions Case, supra* at 197. The carriers divided themselves for all the purposes of the case into three contesting groups, *i.e.,* the Eastern roads (these appellants), the Midwestern roads and the Mountain-Pacific roads. (App. p. 26a). If the parties had not adopted this procedure and if each of the parties had presented its own evidence through its own counsel the proceeding would have been so sprawling and cumbersome as to amount to an exercise in administrative futility.

As it was, the case went to hearing in 1955, and the hearings continued intermittently until December 11, 1959. Approximately 834 exhibits, which included virtually all of the direct evidence in the case, were received, and upwards of 11,000 pages of transcript were transcribed, almost all recording cross-examination. (App. p. 27a). Each group of carriers alleged

and attempted to prove that existing divisions were unlawful because they yielded to that group an inadequate proportion of the revenues derived from the joint rates, and each group sought to have the Commission prescribe new divisions more favorable to it. (App. pp. 27a-29a).

The length of the hearings and the size of the record reflected the substantial amounts of revenue that were involved and the consequent importance of the case to the carriers. Traffic studies relating to the years 1953 and 1955 indicated that the annual volume of traffic between Eastern Territory and Mountain-Pacific Territory amounts to approximately 910,000 carloads or 22,900,000 tons of freight and yields an annual revenue amounting to approximately $890,000,000. (App. p. 29a). Traffic studies for the year 1953 indicated that the traffic between Midwestern Territory and Mountain-Pacific Territory amounts to an annual volume of 787,549 carloads, producing an annual revenue of approximately $634,800,000. (App. p. 35a).[3]

The structure of joint rates for the transcontinental carriage of freight is the oldest in the United States. In 1874, five years after the first transcontinental railroad was completed, joint rates between the Pacific Coast and the Midwest were established. Joint rates between the East and the Pacific Coast were established in 1887. (App. p. 37a). Ever since, the manner of dividing these rates has been a matter of contention among the carriers. The earliest divisions favored the

[3] These traffic studies covered all of Mountain-Pacific Territory, but, as we have noted, the orders of the Commission affected only the divisions of rates between the somewhat less inclusive Transcontinental Territory (plus Montana), on the one hand, and the East and Midwest on the other.

Mountain-Pacific lines on the theory that they needed to be compensated for pioneering in rugged, sparsely-populated country where freight traffic was less dense than in the rest of the United States. (*Ibid.*) In 1922 there was a formal agreement between the Eastern carriers and the Mountain-Pacific carriers to divide the transcontinental rates on a basis somewhat less favorable to the Western carriers but nevertheless retaining essentially the "pioneering" theory of the original divisions. With some modifications, the divisions established by this agreement prevailed at the time the proceeding before the Commission was held. Under the agreement the East was divided into areas called groups. The eastern division in each case was a percentage of the total joint rate, the percentage varying by group within the East and by the point at which traffic was interchanged between the East and the West. Thus, the basic eastern division of the revenue from a movement from a point on the eastern seaboard such as New York by way of Chicago to anywhere in Transcontinental Territory was 27.5 per cent. If the gateway was Peoria the eastern percentage was 31. If the movement was from the Cincinnati-Detroit group by way of Chicago, the eastern percentage was 16. The share of the western carriers was the same regardless of the point of origin or destination in Transcontinental Territory.[4] (App. p. 38a).

Much of the evidence in the Commission proceeding related to relative costs of the respective groups of carriers. (App. p. 43a). For many years, the Commission has regarded cost as a "prime factor" in determin-

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[4] The basic group percentages were subject to certain exceptions that increased the eastern proportions on some traffic. (App. pp. 38a-39a).

ing divisions. *New England Divisions,* 66 I.C.C. 196, 199 (1922). (See App. p. 42a). This reflects the commonsense view that, other things being equal, the carrier groups participating in a joint movement of freight should be compensated in proportion to the costs that each group incurs in performing its part of the service. The cost studies that were presented in evidence by all groups were most elaborate. All of them were based in varying degrees upon a formula devised by the Commission's staff and generally used in its proceedings known as Rail Form A. (App. p. 43a). In addition, there was voluminous evidence concerning traffic, existing divisions, relative financial well-being of the groups of carriers and many other aspects of the transcontinental freight operation.

This evidence was taken by two ICC hearing examiners. They issued their recommended report and order on December 6, 1960, a year after the hearings closed. They found existing divisions unjust, unreasonable and inequitable and recommended the prescription of group divisions that would have increased the revenue shares of the Eastern and Midwestern railroads. (Admin. Rec. pp. 177-247).

The case went before the Commission on exceptions to the examiners' recommended decision and briefs and oral argument in support of exceptions. (App. p. 26a).

**Findings and Orders of the Interstate Commerce Commission**

The Commission first found that the existing divisions were unjust, unreasonable and inequitable. It said that "from our consideration of the cost evidence previously discussed in this report we are convinced that the present divisions are favorable to the defendants [the Mountain-Pacific roads] to an extent not justified by ascertainable cost differences." (App. p.

95a; see also App. p. 143a). The Commission based its cost findings upon the extensive studies of relative costs submitted by the Mountain-Pacific carriers themselves, subject to a number of restatements that the Commission made in those studies, to reflect costing procedures that the Commission found were required by the evidence of record. (App. pp. 49a-69a).

The Commission found that on the Eastern-Mountain-Pacific traffic the existing revenues were divided 21.8 per cent to the Eastern railroads, 19.5 per cent to the Midwestern railroads and 58.7 per cent to the Mountain-Pacific railroads. It found further that even on the Mountain-Pacific roads' own studies of relative costs—without any restatement—the Eastern roads' percentage of the total costs was 23.9. With the restatements that the Commission found necessary in order accurately to measure relative costs the percentages were, for the Eastern roads, 26.1, for the Midwestern carriers 19.8 and for the Mountain-Pacific carriers 54.1. (App. p. 64a).

Having concluded that existing divisions were unlawful, the Commission turned to the prescription of lawful divisions for the future. Section 15(6) of the Interstate Commerce Act provides that the Commission in prescribing new divisions shall give due consideration to a number of factors. Among them are the relative efficiency of the carriers concerned, the relative importance to the public of their services, the status of the carriers as originating, intermediate or delivering lines and "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation . . . ." (See pp. 2-3, *supra*).

The Commission found that there was nothing to choose between the contending groups of carriers in respect of their efficiency and the importance of their services (App. pp. 92a-95a), and its findings disclose its consideration of the status of the different groups of carriers as originating, intermediate or delivering lines (*e.g.*, App. p. 124a). These were all points as to which there was no serious controversy.

In the proceeding before the Commission the principal issue in controversy, apart from relative costs, had been the relative revenue needs of the different carrier groups. The Mountain-Pacific roads contended that, because of their greater proportion of transcontinental traffic and their greater need for new investment funds to expand their plant, they were entitled to a larger share of transcontinental revenues than could be justified on the basis of relative costs. The Eastern and Midwestern roads took issue with this position and introduced evidence showing that their traffic had been declining in relation to that of the Mountain-Pacific lines and that their returns on investment were lower than the returns of the Mountain-Pacific roads. (App. pp. 71a-91a).

The Commission examined the relative positions of the Eastern and Mountain-Pacific roads for the period 1923-30, which was a relatively stable period and immediately followed the establishment of the present divisions, and for the period 1946-1958, which included the most recent data available on the record before the Commission. It found that in terms of freight ton-miles carried, freight revenues and net income from all railroad operations the Eastern roads had declined from a position of relative prominence in the 1920's

to a position inferior to that of the Mountain-Pacific lines. (App. pp. 71a-75a).

The Commission next turned to rates of return on investment that the earnings from all railroad operations had yielded. By all measures the returns earned by the Western lines in the recent period were greater than those of the Eastern lines. (App. pp. 75a-78a). "The most favorable comparison from the standpoint of the western lines" disclosed that, in the post-war period, the return earned by the Mountain-Pacific roads from all railroad services had been 3.89 per cent and the return earned by the Eastern roads had been 3.26 per cent on book investment. If the property base that the Commission found most appropriate was used instead of book investment, the returns for the same period were 4.64 per cent for the Mountain-Pacific group and 3.40 per cent for the Eastern lines. (App. p. 88a).

These rates of return on railroad property devoted to transportation service indicated a reversal of the situation prevailing in the 1920's when the Eastern roads had earned greater returns than the Western roads and indeed were financially the nation's strongest group of railroads. (App. p. 76a). This reversal reflected the relative traffic declines that had been experienced by the Eastern group since the 1920's. (App. pp. 72a-75a). The Commission found:

> "For many years prior to 1949 the western district was below the eastern district and Pocahontas region with respect to total revenue ton-miles, but that year marked a turning point. In the decade 1949-58 the western district has led the East by an average difference of 7 percent. No

developments are in sight which point to a reversal of this trend." (App. p. 88a).

The Commission also considered the relative financial position of the eastern, western and transcontinental groups as freight carriers (*i.e.*, excluding passenger deficits) and concluded "that the eastern railroads are in a less advantageous situation as freight carriers than those in the western district." (App. pp. 82a-88a).

The greatest share of the traffic losses suffered by the Eastern group had been from traffic moving wholly within Eastern Territory. From 1947 to 1958 eastern intraterritorial traffic declined 36 per cent while interterritorial traffic carried by the Eastern roads declined 18 per cent. Together with the other trends noted, the decreasing proportion of intraterritorial traffic for the Eastern roads, which traffic had contributed greatly to their former position of financial strength, and the consequent increasing reliance by them on revenues from interterritorial traffic led the Commission to find that "transportation and economic conditions affecting the eastern and western railroads are far different from those which prevailed 75 years ago when this divisional structure was taking shape." (App. pp. 96a-97a). The Commission further found that the alleged revenue needs of the Mountain-Pacific railroads did not justify any increase in their divisions and that there should be increases in the divisions of the Eastern lines that would reflect revenue needs as well as cost. (*Ibid.*)

On the basis of these findings the Commission prescribed new percentage divisions of transcontinental rates. The percentages were increased for the existing

groups of origin or destination points in the East, and for the first time points of origin and destination in the West were grouped so as to create smaller divisional groups than entire rate territories.[5] (App. pp. 98a-101a, 105a, 110a-114a). For divisions between Midwestern and Mountain-Pacific carrier groups, the Commission prescribed mileage scales that it found would produce "moderate increases in some of the most important midwestern divisions." (App. pp. 103a-106a, 114a-117a).

In a petition for reconsideration of the Commission's first report and order the Mountain-Pacific lines for the first time suggested that there were infirmities in the way the case had been tried by contending that the Commission's findings were inadequate because made on the basis of a record that had been developed in terms of comparing groups of carriers. They seized on the fact that the Commission had relied in part on relative revenue needs in prescribing divisions and asserted that as a result the Commission was required to make certain findings concerning the amount of revenue its order would transfer, the needs that would be met by such a transfer and the effect on the carriers affected by the prescription. The Mountain-Pacific group said that the Commission had not found the overall revenue effect of its order "much less its effect on individual roads." (App. pp. 132a-133a). This was the

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[5] As examples, the basic group division of the Eastern carriers from the Seaboard-New England group to the Pacific Coast group was increased from 27.5% to 34% while the percentage from the same eastern group to the Spokane-Reno group was increased from 27.5% to 38%; similarly the basic eastern division from the Pittsburgh group to the Pacific Coast group was increased from 16.5% to 22% and to the Spokane-Reno group from 16.5% to 24%.

first hint that the Mountain-Pacific lines thought that the Commission was required to translate its prescribed divisions into dollar revenue changes, and it was also the first hint that there was any dissatisfaction with the group mode of trial and the consequent findings in terms of groups. And even here the Mountain-Pacific carriers confined their contentions to the Commission's consideration of the question of revenue needs; they did not assert that the Commission was obligated to make findings as to the relative costs, efficiency or importance of the services of individual carriers.

In response to this petition the Commission made clear that the divisions it had prescribed did no more than end the unjust, unreasonable and inequitable advantage that the existing divisions awarded to the Mountain-Pacific group and give the Eastern carriers a share of transcontinental revenue that was almost but not quite in proportion to their relative costs. In its opinion on reconsideration the Commission estimated that the new interterritorial divisions prescribed by it for the future would yield the Eastern roads 25.3 per cent of the total revenues from the traffic movements in issue, which is less than their share of 26.1 per cent of the costs of the movements. (App. pp. 144a-145a). The Commission also said that the new divisions would result in an increase of about 16.4 per cent in Eastern divisions (App. p. 145a) and reiterated that there would be "moderate increases" in some of the most important midwestern divisions (App. p. 153a). The Commission noted that, therefore, the new and increased divisions for the Eastern lines were not in excess of fair and reasonable levels from the standpoint either of costs or of revenue needs, which were

unquestionably greater for the Eastern group. (App. p. 145a).

**Proceedings in the Court Below**

The Mountain-Pacific lines filed suit in the United States District Court for the Southern District of California praying that the orders of the Commission prescribing new divisions be enjoined and set aside. They argued that the Commission had failed to make findings on issues material to its consideration and that certain findings it did make were arbitrary and without evidentiary support. In particular, the Mountain-Pacific lines urged that the Commission had erred in disregarding the Western group's passenger deficits in the determination of relative revenue needs and that, having given weight to revenue needs in its prescription of future divisions, the Commission had erred in failing to determine the dollar amount of each group's and each carrier's need and the effect that the new divisions would have upon the needs of the groups and individual carriers affected.

The three-judge court set aside the Commission's orders and ordered the case returned to the Commission. (App. pp. 20a, 22a-23a). The court, accepting the Mountain-Pacific lines' newly-devised arguments in substantial part and in some respects going beyond them, held as a matter of law that the Commission is required to make "affirmative findings which disclose that the requirements of Section 15(6) have been met and the factors therein required have been determined and considered, not only as to the groups of roads involved but with respect to each carrier affected in said groups." (App. pp. 19a-20a). It then proceeded to hold that the Commission was required to make find-

ings as to the amount of revenue, in terms of dollars, required by each group of carriers and each individual carrier affected by any new divisions prescribed, the financial effect of the Commission's orders in terms of dollars upon each group of carriers and each individual carrier, and the extent to which the new divisions prescribed would produce for each group of carriers and for each individual carrier involved the revenue found to be required. (App. pp. 19a-20a). The court held that the Commission's findings were deficient in all of these respects and that its orders were therefore invalid. The court held also that the revenue needs issue embraces passenger deficits, and its emphasis of this point suggests the court's belief that, in some unspecified way, the Commission had failed to observe this requirement. (App. p. 20a).

**THE QUESTIONS PRESENTED ARE SUBSTANTIAL**

If the District Court's decision is allowed to stand it will as a practical matter effectively disable the Interstate Commerce Commission from performing, in an important category of cases, its statutory duty to determine the lawfulness of divisions of joint rail rates. The duty imposed upon the Commission by Section 15(6) of the Interstate Commerce Act extends not only to cases in which the issue is the simple one of dividing the revenues from particular joint rates between two carriers but also to cases like this one in which the divisions of all freight rates between many carriers operating in different territories are in issue. This Court long ago recognized that "Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed." *New England Divisions Case,* 261 U.S.

184, 197 (1923). Under the District Court's decision there is grave doubt whether as a practical matter the task could be performed in a major divisions case.

The District Court's decision would seriously impair the usefulness of the Commission's long-established procedures for handling major divisions cases to which scores of carriers—more than 300 in this case—may be parties. The decision is based upon a single paragraph (App. pp. 19a-20a) of an opinion that at no point reflects consideration or awareness of the practical effects of what was being decided. Although the Commission's procedures have been before this Court several times, beginning with the *New England Divisions Case, supra*,[6] it has never before been suggested that they were subject to the artificial and crippling requirements that the District Court would impose.

1. There is no justification in this case for the declaration of the court below (App. p. 20a) that "the Commission is required to make affirmative findings which disclose that the requirements of Section 15(6) have been met and the factors therein required have been determined and considered, not only as to the groups of roads involved but with respect to each carrier affected in said groups."[7] This Court many years ago rejected the contention that there is such a requirement. "To require specific evidence, and sep-

[6] See also Beaumont, S.L. & W. Ry. v. United States, 282 U.S. 74, 81-83 (1930); Baltimore & O.R.R. v. United States, 298 U.S. 349 (1936).

[7] The court also said that the Commission's findings must "show that in the prescribing of just and reasonable divisions the Commission has considered how said divisions affect the individual carriers with respect to the factors required to be determined by Section 15(6)." (App. p. 20a).

arate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief." *New England Divisions Case,* 261 U.S. 184, 197 (1923).

Insofar as the statement of the court below implies that the affirmative findings of which it speaks were wanting, it goes beyond anything that the court was asked, or could properly have been asked, to decide. The adequacy of the Commission's findings as to the factors named in Section 15(6) other than relative costs and relative revenue needs was not seriously disputed. The Commission found nothing to choose between the contesting groups of carriers with respect to the factors of efficiency and the importance of their services and it gave due consideration to their status as originating, delivering or intermediate lines. (P. 13, *supra*).

Literally, however, the court seems to be construing Section 15(6) as imposing upon the Commission the impossible and futile task of somehow comparing the efficiency and the public importance of the Amador Central on the West Coast with those of the Erie Lackawanna in the East, to take only two of the 300 carriers in the case. The appellees would presumably disclaim that they meant to persuade the court to go so far, but the court's words speak for themselves. The Commission would be bound by them on remand. Moreover, as we shall see, the court's views, even if regarded as limited to the matters that were vigorously urged by the appellees, are no less unwarranted and equally burdensome and disruptive in their effects on the administrative process.

2. The appellees' complaint below was directed against the Commission's treatment of relative costs

and relative revenue needs. The Commission's reports plainly disclose that it did give due consideration, as the statute requires, to "the amount of revenue required [by the carriers concerned] to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation . . . ." In applying this statutory standard the Commission is authorized "to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property" and "the revenues, expenses, taxes and returns attributable to the service covered by the divisions under consideration." *Baltimore & O.R.R.* v. *United States,* 298 U.S. 349, 360 (1936).

Relative costs of the contending carrier groups "attributable to the service covered by the divisions under consideration" were a principal factor in the Commission's finding that existing divisions were unlawful and its prescription of lawful divisions. Though the Commission took the additional factor of overall revenue need into account in prescribing divisions, the fact is, as we have seen, that the divisions the Commission prescribed do not even afford the Eastern roads a share of revenues fully proportionate to their share of the cost of providing the service. (App. pp. 64a, 144a-145a). The Commission found "that from the standpoint of both cost and revenue needs the prescribed divisions are not in excess of a fair and reasonable level." (App. p. 145a).

The Mountain-Pacific carriers raised certain questions as to the Commission's cost findings. The court, whose opinion is unclear in this as in other respects,

either dismissed their contentions as going to matters within the exclusive competence of the Commission or left them undecided. (App. pp. 10a, 18a-19a, 20a). Clearly, then, it is not further "affirmative findings" disclosing its consideration of the factor of relative costs that the court was requiring of the Commission.

Rather, the court appears to be concerned throughout the decisional paragraph of its opinion with the Commission's treatment of the factor of revenue need. Thus, it said (App. p. 20a) that "findings must be made as to the amount of revenue, in terms of dollars, required by the respective carriers affected in any new divisions prescribed, the financial effect of the Commission's orders in terms of dollars as to the carriers and the extent to which the new divisions prescribed will produce the revenue found to be required" and that "the findings [must] further show that, as required by Section 15(6), the Commission has considered the revenue needs of the carriers for *all* transportation services, including needs represented by passenger deficits."[8]

[8] The court also concluded "that divisions in rates of return are not equivalent to divisions in terms of dollars and that divisions so stated do not satisfy the requirements of the statutes involved, as they do not disclose a determination or consideration of all the required elements in arriving at what the Commission concludes are just, reasonable and equitable divisions." (App. p. 19a). Taken literally, this statement has nothing to do with the case. The Commission prescribed divisions in terms of percentages of joint rates or, in the case of divisions between the Midwestern and Mountain-Pacific roads, on the basis of mileage scales. It did not prescribe divisions in terms of rates of returns *or* of dollars. The statement seems to be another way of putting the court's mistaken point that there is a requirement that revenue needs be stated and evaluated in gross dollar amounts rather than, as the Commission did on the evidence before it, on the basis of, among other things, relative rates of return.

Like relative costs, relative revenue need was a seriously disputed issue before the Commission. A basic thrust of the revenue need evidence submitted on behalf of these appellants was toward refuting any attempt on the part of the Mountain-Pacific roads to contend that, because of allegedly greater overall revenue needs, they were entitled as a group to divisions yielding them revenue disproportionate to their share of costs. The revenue needs evidence that the Commission discussed included evidence as to economic development and population trends in the territories involved, trends in freight volume, net railway operating income and rates of return. The evidence was extensive and the Commission's consideration thorough. The Commission concluded that the Eastern railroads stood in greater need than the other groups. (App. p. 88a). It relied principally on findings as to comparative rates of return for the groups of carriers from all services; it also found a postwar trend of declining freight traffic of the Eastern roads, the traffic upon which all roads must rely for the revenues necessary for their operation. (App. pp. 75a-78a, 88a). It did not, as the court implies in emphasizing that the findings must show that the Commission has considered revenue needs from all services (p. 23, *supra*), disregard needs arising from passenger deficits. On any comparison the Eastern roads stood in greater need than the Mountain-Pacific lines. (App. p. 88a).

As for the effect of the divisions it prescribed upon the carrier groups affected by its orders, the Commission made findings that demonstrate its full awareness that they would increase somewhat the revenues of the Eastern and Midwestern roads and concomitantly decrease those of the Mountain-Pacific carriers. It found on the basis of a study of specific shipments

that its order would produce for the Eastern carriers an increase of about 16.4 per cent in revenues over what they realized from existing divisions. (App. pp. 144a-45a). And it found that there would be "moderate increases in some of the most important Midwestern divisions." (App. p. 153a).

There is no warrant in the statute or the opinions of this Court for the pointless requirement as to detailed dollar findings that the District Court has laid down. The statute might have been written to provide that the Commission may change divisions only upon finding that one carrier or group of carriers needs revenues in a certain dollar amount and that the change would provide it with a fair proportion of its needs. That is not what the statute provides. It makes relative revenue need one of the factors to enter into the Commission's judgment of what are "divisions that colloquially may be said to be fair." *Baltimore & O.R.R.* v. *United States,* 298 U.S. 349, 357 (1936). It provides that the Commission shall give due consideration to the "amount of revenue required [by the carriers concerned] to pay" their expenses and a fair return. The Commission is not empowered to raise or lower the level of rates in a divisions case, either those whose divisions are in issue or others. It cannot affect divisions that are not in issue. All that it can do, with respect to revenue needs, is to measure relative needs as one guide to the necessary exercise of its judgment as to what divisions of the particular rates being divided are fair and just. As the Commission said in this case, "nothing in the nature of a mathematical formula to measure . . . [revenue] need exists." (App. p. 95a). The prescription of divisions requires "the making of practical judgments." *Boston & Me. R.R.* v. *United States,* 208 F. Supp. 661, 675

(D. Mass. 1962), *aff'd*, 371 U.S. 26 (1962). For the making of such judgments as to revenue needs the customary rate of return data are particularly helpful in that they afford a common denominator for readily appraising the relative situation of the parties. Gross dollar figures of need, which could only be derived from applying some assumed rate of return to carrier investment, would be meaningless and would provide nothing that could be used for comparative purposes.

Findings of the dollar amount of additional revenue that one group of carriers would realize from a Commission divisions order and the dollar amount of reduction in another group's revenues would be pointless for purposes of judicial review. In view of the findings that the Commission made as to relative costs and revenue needs such dollar figures were not required for the purpose of disclosing either the factual basis or the reasons for its ultimate determination. They would necessarily rest upon assumptions as to future traffic volume and rate levels. (Cf. App. p. 149a). Although the Commission has sometimes made findings of dollar amounts in divisions cases the reported cases disclose no instance in which the courts have treated those findings as decisive or even as significant on judicial review.[9]

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[9] The findings that the Commission made as to the effect of its orders (pp. 24-25, *supra*) were more than adequate to satisfy any statutory requirement there may be. In Divisions of Freight Rates, 156 I.C.C. 94, 95 (1929), the Commission made no finding as to the financial effect of the divisions it prescribed and refused to reopen the record to take evidence concerning that effect. Its denial of rehearing was sustained on review in the district court, Beaumont, S.L. & W. Ry. v. United States, 36 F.2d 789, 798 (W.D. Mo. 1929), and the point was not raised in this Court, which affirmed the district court's judgment sustaining the Commission's order, Beaumont, S.L. & W. Ry. v. United States, 282 U.S. 74 (1930).

3. The requirement that the Commission make findings as to revenue need and effect of the divisions prescribed in dollar amounts would be unwarranted even if confined to findings as to groups of carriers. The court below, however, did not confine its holding but laid down as a broad principle of law the requirement that the Commission must make findings in dollar amounts as to the revenue needs of and the effect of the divisions prescribed upon each individual carrier involved. In the instant case this requirement would force the Commission to make detailed dollar amount findings as to each of 300 carriers. The complexities and difficulties involved in determining divisions among groups of carriers, even when the evidence and the findings are directed to groups, are disclosed by the duration of this proceeding and the size of the record. The District Court's opinion would superimpose upon these complexities and difficulties the additional burden of taking evidence and making specific and separate findings as to each carrier involved. It is difficult to think of any requirement more likely to frustrate and to paralyze the Commission's capacity to discharge its duty under Section 15(6) of the Interstate Commerce Act.

The case was tried as an interterritorial case in which the issue, so far as these appellants were concerned, was the primary divisions of transcontinental rates. Subdivisions that would meet particular conditions and particular needs of individual carriers within the affected territories were not within the issues. "[I]t was not necessary that all controversies which may conceivably arise should be settled in a single proceeding." *United States* v. *Abilene & So. Ry.*, 265 U.S. 274, 283 (1924); see also *Beaumont, S.L. & W. Ry.* v. *United States*, 282 U.S. 74, 90 (1930); *New*

*England Divisions Case,* 261 U.S. 184, 201 (1923). The manner of proceeding to determine the lawfulness of primary divisions only was thoroughly acceptable to the Mountain-Pacific roads. Quite explicitly they asked that any questions as to subdivisions within their territory be excluded from consideration. (App. p. 147a).

4. The Mountain-Pacific carriers tried their case in the way we have indicated. With respect to the revenue need issue in particular they presented evidence and proposed findings that were responsive to the issue as it was framed before the Commission. That is, they asked for comparisons of their returns with those of the other groups of carriers, they made assertions as to their dependence on the transcontinental traffic and they sought to persuade the Commission of the odd point that they were in greater need because their business was growing faster than that of the other groups. The findings they proposed for adoption by the Commission concerned their relative needs as a group and not the absolute dollar amounts of group or individual carrier needs. (Mountain-Pacific Br. before ICC, App. pp. 171-79).

The Commission fully considered their contentions and, on a careful analysis of the evidence presented by all parties, made the findings we have described to the effect that by any standard the Eastern roads were in greater need than the Western District roads and the Mountain-Pacific carriers in particular. (App. pp. 71a-88a).

In a petition for reconsideration of the Commission's initial decision the Mountain-Pacific lines for the first time said that this was all wrong and that the Commission must make findings as to the amount of

need to be met and how far the divisions it prescribed would go toward meeting such needs. And they suggested, even more startlingly, that the amount of the need of and effect upon each individual carrier must also be evaluated. (P. 16, *supra*).

By the time the case came to be argued in the District Court the Mountain-Pacific carriers had available to them a recent opinion of another district court that they thought gave color to an argument that the Commission was bound to ignore the way in which they had tried their case and to make findings as to revenue needs of and impact of prescribed divisions upon each individual carrier party. See *Atchison, T. & S.F. Ry.* v. *United States,* 225 F. Supp. 584 (D. Colo. 1964). The district court there set aside a Commission divisions order for failure to comply with the rule that in determining divisions the Commission must have before it typical evidence as to individual joint rates and divisions. See *United States* v. *Abilene & So. Ry.*, 265 U.S. 274, 290 (1924). In the instant case there is no serious issue as to typical evidence in this sense, and none was decided below.

In the *Atchison, T. & S.F. Ry.* case, which dealt with the traffic of only certain individual roads in the Western trunk line group,[10] the district court suggested in an offhand way that the Commission's order might also have been defective for lack of findings as to the revenue needs of individual participating carriers. 225 F. Supp. at 607. For the reasons stated above we submit that the suggestion is erroneous in principle. But in any event reliance upon this dictum by the court

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[10] Akron, C. & Y. R.R. v. Atchison, T. & S.F. Ry., 316 I.C.C. 351 (1962).

below here was grossly misplaced. The Mountain-Pacific carriers in this case asked to be treated as a group with their territorial overall needs considered. They presented their revenue needs case in traditional terms of comparative returns, dependence on the traffic in question and capital requirements. The Commission treated them as a group and made appropriate findings responsive to their contentions as to their relative, not absolute dollar, needs as a group. The effect of the decision of the court below is to put it in the power of a litigant before an administrative agency to try its case on one theory and then, having been unable to persuade the agency to its view, to reverse its position and insist that the entire administrative proceeding—in this case a proceeding that has lasted for nearly ten years—be frustrated and new and additional findings made, responsive to a theory different from that on which the case was tried. This Court should not countenance this kind of stultification of the administrative process.

5. In addition to their attack upon the Commission's findings as to revenue needs, the appellees, as we have noted, raised in the District Court certain issues concerning the adequacy of findings the Commission made to justify adjustments it made to their cost studies, on the basis of which the Commission found the relevant costs of the contending groups of carriers.

The court below said, in apparent reference to these contentions, that "the Commissioners are experts and their stated opinions, as to facts where based on the evidence, are sufficient to support their findings" and that "whether there is sufficient evidence for the Commission to arrive at the costs of service, and the data and information and method used, is within the dis-

cretion of the Commission, absent an abuse thereof." (App. p. 10a). It also said that "plaintiffs' contentions re unlawfulness of the findings, and failure to make findings in many instances, concern matters as to which the Commission has used what this court believes to be the particular *method* adopted by the Commission in its discretion, as a body of experts, in the determination of factors or elements of factors it is required by the statute to consider." (App. pp. 18a-19a). Nevertheless, when it came to state its decision, the court formally found it unnecessary, as it said, to discuss the cost findings issues. (App. p. 20a). The status of those issues therefore remains unclear. There can be no serious doubt, however, that the Commission's cost findings were adequate and were fully supported by the record and that its ultimate determination as to costs concerned matters within its expert discretion. This Court should so determine on this appeal in order that the case, which has been in progress since 1954, may be finally disposed of.

Moreover, the Commission's findings as to costs are sufficient to sustain its orders. Although the Commission found it desirable to treat the matter of revenue needs in determining what divisions to prescribe for the future, the fact is that on the basis of a record study of the movement of actual cars the Commission found that the divisions it prescribed would yield to these appellants revenues slightly less than their relative costs would entitle them to. (App. pp. 64a, 144a-45a). There is no question that the Commission's considered judgment was that the Eastern roads stood in greater need than the Mountain-Pacific roads and therefore any shading of the divisions should have been in their favor. As we understand the ap-

pellees' contention as it was accepted below, it is not that there is any infirmity in this ultimate judgment but only that the findings of the Commission do not measure in the proper way the amount of the respective needs or the way in which the divisions prescribed meet those needs. But if the prescribed divisions are justifiable wholly apart from the greater needs of the Eastern roads, that contention is academic. The Administrative Procedure Act, in Section 10(e), requires that "due account shall be taken of the rule of prejudicial error." In the circumstances described, the alleged want of detail in the revenue needs findings of which the appellees complain could not possibly have prejudiced them.

## CONCLUSION

For the foregoing reasons probable jurisdiction of this appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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# APPENDIX

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# APPENDIX A

## Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., Plaintiffs.

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

MEMORANDUM OPINION AND ORDER RE PREPARATION OF JUDGMENT

This is an action to enjoin and set aside orders of the Interstate Commerce Commission (hereafter referred to as Commission) of March 21, 1963, as amended by order of June 20, 1963, and supplemental order dated December 31, 1963, which orders prescribed new divisions of joint rail rates on transcontinental freight traffic. The Commission's order of March 21, 1963, provided for new divisions of joint rates on Eastern and Mountain-Pacific transcontinental freight traffic substantially more favorable to the Eastern lines than the present divisions. New divisions were also established on transcontinental traffic originating and terminating in Midwest territory and for Midwestern lines participation as intermediate carriers of traffic to and from Eastern (official) and Mountain-Pacific territory. These divisions benefited the great majority of Midwestern lines.

In April, 1954, most of the Eastern lines filed a complaint before the Commission seeking to increase their divisions of transcontinental freight revenue on traffic moving between stations of the Eastern lines in Eastern territory

and stations in the eleven western states of Mountain-Pacific territory. The other Eastern lines now before the court filed similar complaints shortly thereafter.

A group of Midwestern lines filed a separate complaint before the Commission against Mountain-Pacific lines and Eastern lines which brought into issue the lawfulness of (1) their divisions of joint rates between Midwest territory and stations in the western part of Mountain-Pacific territory; and (2) Midwestern lines subdivisions of the primary western divisions of joint rates between Eastern territory and said stations in Mountain-Pacific territory as to which the Midwestern lines performed intermediate service.

The Mountain-Pacific lines filed answers and cross-complaints to the complaints of the Eastern and Midwestern lines. Hearings, which terminated in the Commission's said 1963 orders, began April, 1955. All groups offered evidence based on their studies and claims re costs.

The *present action* was filed by plaintiffs, seven principal western roads and four smaller roads serving Mountain-Pacific territory, on June 28, 1963. A complaint in intervention was filed by forty-five additional roads serving Mountain-Pacific territory. All are referred to here as Mountain-Pacific lines. Also intervening were the People of the State of California and regulatory agencies of ten western states and the St. Louis-San Francisco Railway and Missouri-Kansas-Texas Railroad, Midwestern lines whose revenues were reduced by the Commission's order.

The present divisions of joint rates on transcontinental traffic were established by agreement which has not been approved by the Commission. These revenues account for about 50% of the total freight revenues of Mountain-Pacific lines, 15% of that of Midwestern lines and about 6% of that of Eastern lines.

On June 27, 1963, the court issued a Temporary Restraining Order pending hearing on application for Inter-

locutory Injunction, and this three-judge court, on August 3, 1963, after hearing, entered an Interlocutory Injunction restraining enforcement of the new divisions order until after hearing by the Commission of petitions for reconsideration.

The Commission filed a "Supplemental Report" and order on December 31, 1963, denying all petitions for reconsideration which had been filed by plaintiffs and intervening plaintiffs (hereafter referred to as plaintiffs). The new order made some minimal changes in the order of March 21, 1963. On March 23, 1964, this court entered its Judgment for Interlocutory Injunction, on Supplemental and Amended Complaints previously filed, enjoining the enforcement of the Commission's order of December 31, 1963.

The statutes primarily involved are Section 15(6) of the Interstate Commerce Act [49 U.S.C. 15(6)] and Sections 7(c), 8(b) and 10(e) of the Administrative Procedure Act, enacted in 1946, [5 U.S.C. 1006(c), 1007(b) and 1009(e)]. Section 15(6) provides that in prescribing divisions the Commission is obligated to give due consideration, "among other things," to the following factors:

(1) "(T)o the efficiency with which the carriers concerned are operated,"

(2) "The amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation,"

(3) "the importance to the public of the transportation services of such carriers,"

(4) "and also, whether any particular participating carrier is an originating, intermediate, or delivering line, and"

(5) "any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one

carrier to a greater or less proportion than another carrier of the joint rates, fare or charge."

The numbering of the items to be considered is ours.

As to paragraph (1) of 15(6) above, the Commission concluded that none of the contending groups of carriers had been operated either more or less efficiently than another, and as to paragraph (3) of 15(6) above, that there are no differences in importance to the public of the services of the three groups of carriers.

Section 8(b) of the Administrative Act [5 U.S.C. 1007 (b)] provides in part:

"* * * The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions * * * shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Section 7(c) of the Act [5 U.S.C. 1006(c)] provides in part:

"Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."

Section 10(e) of the Act [5 U.S.C. 1009(e)] provides in part:

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, * * * and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside any agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; * * *."

The interpretation of Section 15(6) is the subject of the major dispute in the instant case. Plaintiffs urge that the Commission is required to consider and to make specific findings as to each of the five factors set forth in Section 15(6), enumerated above. Moreover, they urge that the Commission is further required, by the provisions of Section 15(6), and as well by Section 8(b) of the Administrative Procedure Act, to find:

(1) The dollar amount of revenue required by each individual carrier involved;

(2) The financial effect of the prescribed divisions on each individual carrier involved; that is, the extent to which the prescribed divisions will produce the dollar amount of revenue required by each individual carrier involved.

The "findings" made by the Commission following its report of March 21, 1963, are as follows:

"Findings

1. We find that the present divisions of joint rates applicable to the transportation of property between points in eastern or official territory and points in transcontinental territory (including Montana) as between the complainants in No. 31503 (including the Missouri-Illinois Railroad Company) and in No. 31503 (Sub-Nos. 4 and 5), on the one hand, and the defend-

ants in the said complaints, cross-complainants therein, and the complainants in No. 31503 (Sub-No. 1), on the other hand, are unjust, unreasonable, and inequitable.

2. We find that just, reasonable, and equitable divisions in lieu of those referred to in finding 1 would be those set forth in appendix B hereto.

3. We find that the present divisions of joint rates applicable to the transportation of property between points in midwestern territory, as herein defined, and points in transcontinental territory (including Montana), as herein defined, as between the complainants in No. 31503 (Sub-Nos. 1, 2 and 3) and the defendants and cross-complainants in the said complaints, are unjust, unreasonable, and inequitable.

4. We find that just, reasonable, and equitable divisions in lieu of those referred to in finding 3 would be those set forth in Appendix C hereto.

The hearing examiners' rulings on evidence are affirmed, for reasons stated in the recommended report.

An appropriate order will be entered."

The Commission bases its conclusion that the Eastern and Midwestern lines should receive larger divisions of joint rates on the ratio of past revenues received from all services to total cost of services. Plaintiffs object to the Commission's method of determining costs because it failed to use certain adjustments suggested by plaintiffs in the Rail Form A formula used. The Commission used average costs of all freight traffic, not the costs of transcontinental freight here in issue. This, plaintiffs urge, is in violation of the Acts involved because the Commission failed to require Eastern and Midwestern lines to produce data in their sole possession showing their actual costs, and the Commission therefore failed to make required findings and conclusions, with respect thereto, supported

by substantial evidence. Plaintiffs also contend the Commission refused to make essential findings and conclusions as to the reasonableness of the particular percentage divisions prescribed for Eastern lines and that the divisional scales prescribed for determining the divisions of Midwestern lines are not supported by "rational findings or substantial evidence."

With respect to the Commission's treatment of "revenue needs", plaintiffs say it disregarded *passenger deficits* and treated Mountain-Pacific roads "as freight carriers", whereas Section 15(6) requires revenue needs be determined with respect to *all* transportation services, and that no findings were made in suport of excluding passenger deficit in determining revenue needs, in violation of Section 8(b) of the Administrative Procedure Act.

The parties appear to agree that the prescribing of divisions involves the exercise of judgment and that the Commission shall have broad discretion in the exercise of its judgment, that it need not specify the "weight" it attributes to various items of evidence and that its evaluation of the importance of the various factors is peculiarly within the purview of the Commission. See *Boston & Maine Railroad* vs. *United States*, 208 F. Supp. 661, (D.C. Mass. 1962), affirmed 371 U.S. 26. At page 670, the court states:

> "The Supreme Court in Universal Camera Corp. v. National Labor Relations Board, 1951, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456, has interpreted section 1009(e) to require affirmance of the findings of an administrative agency if, taking the record as a whole, they are supported by substantial evidence, that is, 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' It has further been held that the Administrative Procedure Act has not altered the rule of administrative finality. (Citing cases) The courts will not examine the findings of fact further than to determine whether there

was substantial evidence to sustain them. (Citing cases) If the evidence was substantial, then the Commission alone is authorized to decide upon its weight or the significance of the facts. Baltimore & Ohio R. Co. v. United States, 1936, 298 U.S. 349, 358, 56 S. Ct. 797, 80 L.Ed. 1209. The Commission's order is the product of expert judgment which carries a presumption of validity. 'And he who would upset the * * * order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' (Citing cases.) The administrative body was created for the purpose of using its judgment and its knowledge. (Citing cases.)"

The court goes on to observe that the "expertise" of the Commission is not sufficient by itself but that findings supported by substantial evidence are required. In commenting on the function of the court, it is stated at page 671 of the opinion:

"The function of the court is to review the administrative action, not to determine whether the 'court on the evidence would have reached the same result as did the Commission.' (Citing cases.). The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body. ( Citing cases.)"

The court also observes at page 671:

"It is to be noted that the Commission 'is required to make not only findings that support its decision * * * but also findings that are intelligible and complete.' Concurring Opinion of Mr. Justice Douglas in United States v. Drum, 82 S.Ct. 408, Jan. 15, 1962."

*Mississippi River Fuel Corp.* vs. *F.P.C.*, 163 F. 2d 433 (D.C. Court of Appeals, 1947), was a rate case before the

Federal Power Commission on a petition to review and set aside its order. The court, after stating at page 439:

> "The Commission has wide power in the selection of formulae for the ascertainment of costs."

and

> "It is not the function of the courts to select formulae in these matters."

observes:

> "The Congressional provisions extend to complicated, difficult matters as well as to simple questions. The courts cannot evade their responsibility merely because the subject matter is obscure. And neither can they be required to probe the minds of the agency for unfound facts or unexpressed reasons. The coordination of the two functions of administrative discretion and judicial review requires that the facts upon which the discretion is exercised, and the reasons, be clearly and completely stated. When the matter is complicated, the necessity is greater."

There is no question but that whether the new divisions are just, reasonable and equitable is for the Commission, not for the Court. But it is equally clear that, in prescribing the divisions, the minimum duty of the Commission is to give due consideration to each of the five factors the Congress has listed in Section 15(6). Furthermore, although the Commission has broad discretion in the matters involved, such discretion can never serve as a substitute for the "findings and conclusions, as well as the reasons or basis therefor", required by Section 8(b) of the Administrative Procedure Act [5 U.S.C. § 1007(b)], or for the clarity of findings required by that Act.

Plaintiffs assert that Section 15(6) requires findings showing determination of revenue needs in terms of dollars as to *individual carriers* and consideration thereof in prescribing new divisions, whereas defendants contend the

provisions of Sections 15(6) require determination of revenue needs only as to the *carrier groups* and not individual carriers and that such needs may be in terms of rates of return and need not be determined dollarwise.

In considering what Congress intended by the provisions of Section 8(b), as to necessary findings and conclusions, this court concludes that it is not the duty of the court to evaluate each bit of evidence and determine whether the Commission has drawn the proper conclusion therefrom. In this case the court has reviewed the portions of the record cited by the parties as required by above noted Section 10(e). The Commissioners are experts and their stated opinions, as to facts where based on the evidence, are sufficient to support their findings. Whether there is sufficient evidence for the Commission to arrive at the costs of service, and the data and information and method used, is within the discretion of the Commission, absent an abuse thereof. [§ 10(e), 5 U.S.C. § 1009(e).]

It is to be noted that the Administrative Procedure Act was enacted in 1946 and that the reason for such legislation appears, as stated by Congressman Walter on the floor of the House [92 Congressional Record 5653 (1946)], to be to insure a determination by the Commission in a rate case of the issues of law, fact and discretion, and that "the mere parroting of findings or conclusions in the words of the statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirement of this Section unless both the statute and issue were very narrow indeed." The United States Supreme Court in *Burlington Truck Lines* vs. *United States*, 371 U.S. 156 at 167, states:

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits

on its discretion.' *New York* v. *United States,* 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.'' *Federal Communications Comm'n.* v. *RCA Communications, Inc.,* 346 U.S. 86, 90. The Commission must exercise its discretion under § 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' Compare *id.,* at 91. And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'' *Phelps Dodge Corp.* vs. *Labor Board,* 313 U.S. 177, 197.''

As to the revenue needs of the carriers concerned, the Commission must of necessity, in order to comply with the Congressional mandate of Section 15(6), give due consideration to the amount required to pay their respective ''operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation.'' Even though the Commission has broad discretion as to the facts it considers in arriving at conclusions as to the five requirements of Section 15(6), and in the evidence necessary to establish the factors deemed relevant in the making of new divisions; the law nonetheless demands that the new divisions be just and reasonable. And while the justness of the divisions is for the Commission in the first instance, the Court must be able to determine from the findings, conclusions, and orders of the Commission, whether the mandate of the statute involved has been met. It appears to the Court that, as to this particular factor, the mandate of Section 15(6) requires a finding in terms of dollars (''amount''), and that the Commision must also find the dollar amount of return to the carriers' resulting from the new divisions, in order to arrive at the required determination as to whether the new divisions are ''just, reasonable and equitable''; and to enable this Court to

review the adequacy of the findings to support the Commission's determination.

Regarding the need to make findings of the financial effect of the divisions, see *Chicago, Milwaukee, and so forth, Railway Co.* vs. *Illinois,* 355 U.S. 300 at 309-10, footnote 8 (1958), where the United States Supreme Court, in affirming an order of the District Court remanding the case to the Commission for further findings, said in footnote 8, page 309-10:

> "It is axiomatic that to know whether something is a fair proportionate part of something else, we must be told what the something else is."

This court does not conclude it is required to determine what evidence the Commission must consider and weigh in complying with each requirement for the prescribing of new divisions, nor has the court the power to substitute its fact appraisal for that of the Commission, but once the necessary factors are determined there must be findings which disclose that the financial effect of any new divisions as to each carrier involved has been considered by the Commission in order that any reviewing court may be enabled to determine if the statutory requirements have been met by the Commission.

The issue of whether the Commission, in prescribing new divisions, must, pursuant to the provisions of Section 15(6), consider their effect on the individual carriers involved or only the groups of carriers concerned is one of major importance. The defendants urge that the Commission need only consider the justness of divisions as between the groups and that the equitable *subdivision* of the primary division of transcontinental freight revenues as between the lines of each group is not the concern of the Commission at this time but that any carrier who may not receive a fair share under the subdivisions made as between the carriers in a group may in due time take its

case to the Commission. Plaintiffs contend that the Commission, in determining the divisions between the groups, must consider the effect on the individual carriers. As noted above, Section 15(6) requires the finding of the amount of revenue required to pay operating expenses, and so forth, "of such carriers."

The case of *Atchison, Topeka and Santa Fe, et al.* vs. *United States,* et al., 225 F. Supp. 584 (D.C. Colo. 1964), concerned an order of the Commission establishing divisions of joint rates for railroad freight in eastern-transcontinental inter-territorial traffic. The District Court held that the Commission improperly found presently existing divisions to be unlawful and that the new divisions established by the Commission were unlawfully prescribed. The case was remanded for proceedings consistent with the opinion. The court states, at page 606:

> "From the general tone of the Commission's report, it cannot be concluded that the Commission did consider substantial evidence of revenue needs of *all* the parties, either as groups or as individuals, for the report shows only a consideration of the revenue needs of the eastern lines, and even then not all of the eastern lines' needs were in evidence on an individual basis. Since the 28277 scale principally affects those lines with shorter movements in Official territory, it would not be unreasonable to require the Commission to show some evidence of the revenue needs of these lines; and some indication that the Commission considered the principal effect of the 28277 schedule on particular transcontinental lines."

In holding the Commission failed to observe the standards of Section 15(6) in making its findings, the court says at page 607:

> "We think that the requirement should not be relaxed here, for the necessity for us to determine whether the Commission exercised its discretion within

> the bounds of 'due consideration' to efficiency, revenue needs, public interest, and any other facts entitling one carrier to a greater or less proportion of a joint rate, is as great under Section 15(6) as it is to determine the bounds of 'public convenience and necessity' under Section 207(a)."

The "typical evidence rule" was considered at length by the court in the Santa Fe case, supra. After noting the evidence before the court in the New England Divisions Cases, 261 U.S. 184 [66 I.C.C. 196 at 201], the court, in the Santa Fe case, states at page 591:

> "It goes without saying that the Commission was not obligated to consider every last rate and division of every carrier; but it was obliged to do something more than consider the aggregate impact on the groups of railroads of a given formula for dividing joint rates as between the groups."

Thereafter the court quotes from the opinion in the New England Divisions Cases re the requirements of the typical evidence rule and then states the rule at page 592, as follows:

> "The Commission is merely required to have before it, and to consider, and to some extent to rely on representative evidence relating to particular rates and divisions of particular carriers; but, even when the evidence is based merely on a representative sample of all relevant traffic moving during a certain period, it must relate to particular rates and divisions of particular carriers. Obviously, evidence which is based on all traffic moving during a certain period must also relate to particular rates and divisions of particular carriers."

The typical evidence rule does not operate to excuse failure to find that the divisions are just, reasonable and equitable

not only between the groups of carriers involved but also as to each individual carrier in each division. Referring again to the Santa Fe case, supra, the court, at page 595, in speaking of the use of aggregate data, states:

> "Before it relies on average or aggregate data, the Commission must make sure that the divisions formula under consideration (although seemingly just and equitable when viewed in terms of its impact on a group of railroads as a group) has not been constructed in such a way that its impact on any particular division of any particular rate as applied to any particular carrier is unjust."

Further, at page 596, quoting from Beaumont, etc. Ry. Co. vs. United States, 36 F. 2d 789 (D.C. Mo. 1929), affirmed 282 U.S. 74:

> " 'But it need not under all circumstances take specific evidence as to each rate of every carrier. When considering divisions of numerous joint rates applicable to traffic passing through gateways between different territories, the Commission may make the required determinations and establish the bases for divisions between groups of carriers in the respective territories upon evidence which it reasonably may deem typical and to have sufficient probative weight to *justify the necessary findings and the order in respect* of each rate.' "

Continuing at page 597:

> "The defendants' suggestion that the requirements imposed by the typical evidence rule no longer obtain is unwarranted. It is said that the decision of the Supreme Court in the case of Baltimore & Ohio R. Co. vs. United States, 298 U.S. 349, 56 S.Ct. 797, 80 L.Ed. 1209 (1936) has vitiated the requirement that evidence representative of particular divisions of particular rates of particular carriers must be considered by the

Commission in a divisions case. Such a contention is without merit."

The case of *Baltimore & Ohio R. Co.* vs. U. S., 298 U.S. 349, is discussed by the court in Santa Fe vs. U. S., 225 F. Supp. 584, supra, at some length. At page 598 it observes that the issue in the Baltimore & Ohio case before the Supreme Court was whether the divisions and rates established by the Commission were confiscatory, pointing out, however, at page 598 of its opinion:

"In the proceeding before the Commission, however, there was no issue with respect to whether or not the level of the rates established was confiscatory."

At page 599, the Colorado court, after quoting from the opinion in the Baltimore & Ohio case, says:

"It is, rather, the Commission's function to examine the divisions of rates which currently obtain (assuming them to be non-confiscatory) and determine, from an examination of the particular divisions of the particular rates in question between particular carriers, whether the division is, in the broadest sense, 'fair.' B & O, whatever else it stands for, certainly does not stand for the proposition that the Commission, in prescribing divisions of joint rates, need not take notice of what those rates are."

True, the court there was focusing on the determination of the unlawfulness of the *present* divisions but it is reasonable to assume that the same rules would apply in determining the fairness of new divisions. We are to have in mind, in the case at bar, that the divisions of joint rates are concerned and not the determination or the propriety of the amount of the joint rates involved. At page 599, the court, in the Santa Fe case, continues:

"Moreover, there is no substantial showing that the Commission had considered evidence of any specific rates and divisions."

After observing that there may have been "data respecting the particular rates applicable to carriers who are here parties plaintiff available to the Commission", the court says that that data was pre-war and there was no reason to assume that that information had "any great bearing" on the present divisions of "particular rates" applicable to the transcontinental western lines who were parties plaintiff to the action and that there was no statement by the Commission that it did consider the evidence, and on page 600 the court observes:

> "To the contrary, there is a statement, a wholly erroneous conclusion of law, that it was not obliged to consider any evidence showing specific rates. In light of the absence of the one statement and the presence of the other, we are not warranted in assuming that the Commission did consider such evidence. * * * In the aggregate the impact of the 500-A schedule may indeed be unjust, but the Commission has not made the required comparison of aggregate traffic evidence leading to that conclusion with evidence representative of particular divisions of particular rates which would warrant our endorsement of the action which the Commission has taken in declaring the 500-A schedule unlawful."

Defendants point out that the New England Divisions Cases, 261 U.S. 184 (1923), hold (pages 201-202) that the Commission's divisions are not invalid unless they prescribe the proportion to be received by each of the connecting carriers. This ruling shows that subdivisions of primary divisions need not be made "if the real controversy is merely how much of the joint rate shall go to carriers east of the Hudson River and how much to carriers west * * * *" (page 202, New England Divisions Cases), but the case does not hold that the needs of individual carriers need not be considered in determining the primary divisions involved. This same conclusion may be said to apply with

respect to the rulings of the United States Supreme Court in *United States* vs. *Abilene & Southern R. Co.*, 265 U.S. 274 (1924), and *Beaumont, S. L. & W. R. Co.* vs. *United States*, 282 U.S. 74 (1930).

There is always the question of just how much reason the Commission must set forth in support of its methods of determining necessary elements involved. The reviewing court must satisfy itself that the bricks (elements) which go into the structure, to wit, the Commission's divisions, are in such form that the court can ascertain whether the bricks used are those required by law. This fact is recognized by the statutory requirements and cases discussed hereinabove, and the necessity of findings as to the revenue needs of and the financial effect of the new divisions on each carrier involved appears to the court to be well established.

Justice Cardozo, in setting aside an order of the Commission in *United States* vs. *Chicago, M. St. P. and P. R.*, 294 U.S. 499 at 510-511 (1935), expressed the standard of judicial review as follows:

> "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. . . . The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U.S. 74, 86; *Florida* v. *United States*, 282 U.S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Plaintiffs' contentions re unlawfulness of the findings, and failure to make findings in many instances, concern

matters as to which the Commission has used what this court believes to be the particular *method* adopted by the Commission in its discretion, as a body of experts, in the determination of factors or elements of factors it is required by the statute to consider. Specific findings of the propriety of the use of information which the Commission, as experts in this field, considers to be sufficient and adequate re pertinent elements are not necessary. To require same would be to compel the Commission to justify each method and all facts considered in arriving at every factor involved in the making of new divisions. We hold this would exceed the requirements of Section 8(b) of the Administrative Procedure Act. The economic regulation of business is not susceptible of the same degree of definiteness as commercial law. Once the required factors are determined by the Commission, it must, however, apply them in a realistic fashion in drawing its conclusions as to just, reasonable and equitable divisions.

Defendants take the position that the Denver & Rio Grande, Missouri-Kansas-Texas and St. Louis-San Francisco Railroads have waived any objections to losses resulting from the new divisions. The court concludes that there has been no intentional relinquishment of a known right on the part of any of these roads and that none of them waived any right to object to losses resulting to them from the new divisions.

Divisions in general, defendants urge, are made on the basis of "rate of return" figures which are equivalent to divisions in terms of dollars. The court concludes that divisions in rates of return are not equivalent to divisions in terms of dollars and that divisions so stated do not satisfy the requirements of the statutes involved, as they do not disclose a determination or consideration of all the required elements in arriving at what the Commission concludes are just, reasonable and equitable divisions. The court further concludes that to comply with the provisions

of the sections of the Interstate Commerce and the Administrative Procedure Acts, cited and discussed hereinabove, the Commission is required to make affirmative findings which disclose that the requirements of Section 15(6) have been met and the factors therein required have been determined and considered, not only as to the groups of roads involved but with respect to each carrier affected in said groups; that findings must be made as to the amount of revenue, in terms of dollars, required by the respective carriers affected in any new divisions prescribed, the financial effect of the Commission's orders in terms of dollars as to the carriers and the extent to which the new divisions prescribed will produce the revenue found to be required; that the findings show that in the prescribing of just and reasonable divisions the Commission has considered how said divisions affect the individual carriers with respect to the factors required to be determined by Section 15(6); and that the findings further show that, as required by Section 15(6), the Commission has considered the revenue needs of the carriers for *all* transportation services, including needs represented by passenger deficits.

The court has discussed a majority of issues 1 to 19 of the 30 issues involved, as submitted by the parties, and in view of the conclusions reached it is unnecessary to discuss issues 20 to 30. However, no inference is to be drawn that the court is of the opinion that the issues 20 to 30, or any other numbered issues not discussed in this opinion, are of the nature it would be required to decide should they be raised at some future time.

By reasons of the insufficiency of the Commission's findings and conclusions, as stated above, the Commission's orders of March 21, 1963, as amended, and December 31, 1963, will be set aside, and the cause will be remanded to the Commission for further proceedings consistent with this opinion.

Any order which might hereafter be made by the Commission in the proceedings under review or new proceedings would be subject to challenge and to injunctive relief if the Commission failed to act in accord with the statutory requirements. *Cantlay & Tanzola* vs. *United States,* 115 F. Supp. 72 at 84 (D.C. S.C. Cal. 1953), and 28 U.S.C., Sections 1336, 2284, 2324 and 2325. In the circumstances, the matter of injunctive relief herein becomes moot.

This opinion shall serve as Findings of Fact and Conclusions of Law to the extent required by Rule 52(a), F.R.Civ.P.

Counsel for the plaintiffs are requested to submit Judgment setting aside the Commission's orders and remanding the cause to the Commission for further proceedings. This memorandum opinion is not a final Judgment.

Dated: January 25, 1965.

STANLEY N. BARNES
United States Circuit Judge

WM. C. MATHES
United States District Judge

E. AVERY CRARY
United States District Judge

## APPENDIX B

### Judgment and Stay Order of The District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., Plaintiffs.

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

This action came on for trial and hearing before the Court, Honorable Stanley N. Barnes, United States Circuit Judge, Honorable William C. Mathes, United States District Judge, and Honorable E. Avery Crary, United States District Judge, presiding, and the issues having been duly tried, heard and determined, a Memorandum Opinion having been duly filed and the Court having ordered that said Opinion "shall serve as Findings of Fact and Conclusions of Law to the extent required by Rule 52a, F.R.Civ.P.", Now, THEREFORE, in accordance with said Findings of Fact and Conclusions of Law,

IT IS ORDERED AND ADJUDGED that the Order of the Interstate Commerce Commission dated March 21, 1963, as amended by the Order of that Commission dated June 20, 1963, and also the Order of that Commission dated December 31, 1963 (each and all as entered by the Commission in the cause under its Docket No. 31503 and Sub Nos. *Akron, Canton & Youngstown R. Co. et al.* v. *Atchison, Topeka & Santa Fe Ry. Co. et al.*), and each and all of said Orders, be and the same are hereby set aside and that said cause be and the same is hereby remanded to the

Commission for further proceedings consistent with the said Memorandum Opinion of this Court.

Dated February 17, 1965.

STANLEY N. BARNES
United States Circuit Judge

WM. C. MATHES
United States District Judge

E. AVERY CRARY
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., Plaintiffs.

VS.

UNITED STATES OF AMERICA, ET AL., Defendants.

**Order Staying Judgment**

IT IS HEREBY ORDERED AND ADJUDGED (1) that the effectiveness of the Judgment signed, dated and entered concurrently herein on this date is hereby stayed for the period of sixty (60) days from said date, and if a notice or notices of appeal to the Supreme Court are filed within such period, then this stay shall continue until final disposition or termination of such appeal or appeals; and (2) that during the aforesaid period or periods the Judgment for Interlocutory Injunction and the Judgment for Interlocutory Injunction on Supplemental Complaint and

on Amended Complaint shall continue in full force and effect.

Dated: February 17, 1965.

STANLEY N. BARNES
United States Circuit Judge

WM. C. MATHES
United States District Judge

E. AVERY CRABY
United States District Judge

## APPENDIX C

### Reports and Orders of The Commission

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[321 I.C.C. 17]

INTERSTATE COMMERCE COMMISSION

No. 31503 [1]

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.

Decided March 21, 1963

1. Divisions of joint rail rates between eastern territory and transcontinental territory, found to be unjust, unreasonable, and inequitable. Lawful divisions prescribed.

2. Divisions of joint rail rates between midwestern territory and transcontinental territory, including subdivisions of joint rates between eastern territory and transcontinental territory for transportation in midwestern territory, found to be unjust, unreasonable, and inequitable. Lawful divisions prescribed.

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[1] This report embraces also No. 31503 (Sub-No. 1), Ahnapee & Western Railway Company et al. v. Abilene & Southern Railway Company et al.; No. 31503 (Sub-No. 2), Chicago, Burlington & Quincy Railroad Company et al. v. Abilene & Southern Railway Company et al.; No. 31503 (Sub-No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Same; No. 31503 (Sub-No. 4), Louisville & Nashville Railroad Company v. Akron, Canton & Youngstown Railroad Company et al.; and No. 31503 (Sub-No. 5), Cincinnati, New Orleans & Texas Pacific Railway Company v. Same.

HERRING, *Commissioner:*

Each of the three major groups of contending parties filed exceptions to the recommended report and order of the examiners and replied to the others' exceptions. The interveners and The Texas and Pacific Railway Company are also exceptants. We have heard oral argument. Our conclusions differ to some extent from those of the examiners. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

These proceedings, consisting of a principal complaint and five others subnumbered, as well as certain cross-complaints, present the question of the lawfulness of divisions of joint rates for railroad transportation between points in mountain-Pacific territory and points in the rest of the conterminous United States, except southern territory. There are three principal groups of litigants with mutual adverse interests; namely, eastern railroads, midwestern railroads, and transcontinental railroads.

The eastern lines (sometimes hereinafter called the complainants) include most of the rail carriers of all classes assigned for statistical purposes to the eastern district and the Pocahontas region. The midwestern lines (complainants in one of the cases and defendants in others) are rail carriers which operate solely or mainly in that part of western territory which is east of the Rocky Mountains, the class I railroads in this group being the following: Chicago and North Western Railway Company; Chicago Great Western Railway Company; Chicago, Rock Island and Pacific Railroad Company; Elgin, Joliet and Eastern Railway Company; Green Bay and Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Kansas, Oklahoma & Gulf Railway Company; Lake Superior & Ishpeming Railroad Company; Minneapolis, Northfield and South-

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ern Railway; Soo Line Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; and St. Louis-San Francisco Railway Company. The transcontinental lines (sometimes hereinafter referred to as the defendants) are railroads of all classes which operate wholly or partly west of the Rocky Mountains, including the following class I carriers: The Atchison, Topeka and Santa Fe Railway Company and its Texas subsidiaries; The Denver and Rio Grande Western Railroad Company; Great Northern Railway Company; Northern Pacific Railway Company; Southern Pacific Company and certain of its subsidiaries (not including the St. Louis Southwestern Railway Company); Spokane International Railroad Company; Spokane, Portland and Seattle Railway Company; Union Pacific Railroad Company; and The Western Pacific Railroad Company and its subsidiaries.[2]

The State regulatory commissions of 10 of the 11 Mountain-Pacific States [3] were permitted to intervene in support of the defendants. One of these, the Wyoming Public Service Commission, later declared its neutrality. The Arizona Corporation Commission did not intervene.

Hearings extended intermittently from April 26, 1955, to December 11, 1959. Direct testimony was principally in writing contained in the exhibits, of which there were 834. Oral testimony, mainly on cross-examination, made up the transcript of 11,242 pages. Briefs filed by the 3 groups of principal rail carriers covered 1,145 pages plus voluminous appendixes.

*No. 31503 and Sub- Nos. 4 and 5.*—The principal complaint was filed on April 5, 1954, by the eastern lines, and the defendants therein are chiefly the western rail carriers whose lines connect directly or indirectly with those of the complainants. The divisions assailed in this complaint as

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[2] For this note and succeeding ones see appendix A.

[3] See appendix A.

unreasonable, inequitable and unduly prejudicial and preferential under section 15(6) of the Interstate Commerce Act are those of joint rates between eastern territory and points in the 11 Mountain-Pacific States, subject to unimportant exceptions listed in note 4.[4]

The transcontinental lines filed an answer to this complaint combined with a cross-complaint in which they allege that the divisions assailed in the principal complaint are unjust, inequitable, and unduly prejudicial to themselves. Separate answers and cross-complaints similar to those of the transcontinental defendants were also filed by the Chicago, Burlington & Quincy Railroad Company and its subsidiaries, and also by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

The complaints in Sub-Nos. 4 and 5 were filed by the Louisville and Nashville Railroad Company and the Southern Railway Company and a subsidiary, which operate in part between Ohio River cities and East St. Louis, Ill., and therefore have an interest in the divisions involved in the principal complaint. They attach those divisions on the same grounds relied upon in that complaint.

The Missouri-Illinois Railroad Company, assigned to the eastern district for statistical purposes, named as a defendant in No. 31503, with its answer filed a cross-complaint against all other defendants, which in practical effect makes it a cocomplainant in that case. The transcontinental defendants responded to that cross-complaint with one of their own and also filed cross-complaints in Sub-Nos. 4 and 5.

*Sub-Nos. 1, 2, and 3.*—The complaint in Sub-No. 1 ranks with No. 31503 as one of the two major components of this litigation. It was filed by the midwestern lines on June 3, 1954, naming as defendants the eastern and the trans-

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[4] See appendix A.

continental lines. Therein the midwestern lines assail as unreasonable, inequitable, and unduly prejudicial their divisions of (1) joint rates between eastern territory and that part of mountain-Pacific territory known as transcontinental territory as to which they perform intermediate service, and (2) joint rates betwen transcontinental territory and midwestern territory.[5]

In Sub-Nos. 2 and 3 the Burlington and the Milwaukee, respectively, and certain of their subsidiaries allege that they participate in the joint rates and transportation involved in Sub-No. 1, and ask that they be granted the same relief as may be accorded the complainants in that docket. The transcontinental defendants are also cross-complainants in Sub-No. 1.

21 *Traffic between eastern and mountain Pacific territories.*—For the purpose of estimating the amount of revenue produced by the rates subject to the divisions here in issue, the parties made traffic studies based on actual movements in 1953 and 1955. The eastern lines undertook to measure all carload traffic between eastern and mountain-Pacific territories covered by interline settlements in October 1953. The defendants applied a sampling process to abstracts of waybills of carload shipments in 1953 and 1955. Certain other differences in the scope of these studies are of little practical importance. As a whole, the studies indicate that, if 1953 and 1955 may be considered representative years, the traffic between these territories amounts to an annual volume of 910,000 carloads or 22.9 million tons, and yields about $890 million in annual revenue. These figures do not include less-than-carload traffic, which equals about 1.5 percent of the carload tonnage. Eastbound traffic predominates, accounting for 63 percent of the carloads, 70 percent of the tons, and 56 percent of the total revenue.

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[5] See appendix A.

The primary commodity classifications of the carload traffic are represented by the following approximate percentages:

| Classification | Cars | Tons | Revenue |
|---|---|---|---|
| | *percent* | *percent* | *percent* |
| Products of agriculture | 26 | 19 | 19 |
| Animals and products thereof | 1 | 1 | 1 |
| Products of mines | 3 | 4 | 2 |
| Products of forests | 22 | 29 | 20 |
| Manufactures and miscellaneous | 44 | 45 | 55 |
| Forwarders' traffic | 4 | 2 | 3 |
| | 100 | 100 | 100 |

Although the parties differ as to the proper method of estimating representative average hauls within the respective territories, it is fair conclusion that the average movement in eastern territory is 600 miles and in western territory 2,000 miles, based on short-line distances. From this it would appear that the complainants perform approximately 23 percent of the total service, measured by short-line ton-miles. The same percentage represents their share of the joint revenue as indicated by the defendants' traffic studies, the shares of the midwestern lines and the defendants being 15 percent and 62 percent, respectively. The shares of individual carriers in the group totals as estimated by the defendants for 1953 are shown below:

| | Revenue (000) | Percent |
|---|---|---|
| NYC | $40,778 | 21.0 |
| Penn | 39,703 | 20.5 |
| Erie | 18,047 | 9.3 |
| Wabash | 17,884 | 9.2 |
| B&O | 17,846 | 9.2 |
| NYC&StL | 15,308 | 7.9 |
| C&O | 9,248 | 4.8 |
| NYNH&H | 3,699 | 1.9 |
| LV | 2,810 | 1.4 |
| DL&W | 2,253 | 1.2 |
| B&M | 1,726 | .9 |
| Rdg | 1,442 | .7 |
| N&W | 1,017 | .5 |
| C&EI | 957 | .5 |
| Others | 21,279 | 11.0 |
| Total | 193,997 | 100.0 |

*Midwestern lines*

| | Revenue (000) | Percent |
|---|---|---|
| CRI&P | $21,601 | 17.2 |
| CB&Q | 19,446 | 15.5 |
| C&NW | 15,883 | 12.7 |
| MoPac | 13,809 | 11.0 |
| T&NO | 10,327 | 8.2 |
| StLSW | 9,506 | 7.6 |
| IC | 6,290 | 5.0 |
| T&P | 5,426 | 4.3 |
| CGW | 3,635 | 2.9 |
| StLSF | 3,351 | 2.7 |
| M&StL | 2,063 | 1.7 |
| GM&O | 1,737 | 1.4 |
| MKT | 1,717 | 1.4 |
| GB&W | 544 | .4 |
| Others | 9,984 | 8.0 |
| Total | 125,319 | 100.0 |

*Defendants*

| | Revenue (000) | Percent |
|---|---|---|
| AT&SF | $139,803 | 27.0 |
| UP | 130,200 | 25.0 |
| SP | 118,570 | 22.9 |
| GN | 37,036 | 7.1 |
| NP | 36,176 | 7.0 |
| D&RGW | 19,416 | 3.7 |
| WP | 12,774 | 2.5 |
| CMStP&P | 7,669 | 1.5 |
| Others | 17,196 | 3.3 |
| Total | 518,840 | 100.0 |

23 The foregoing figures for the defendants reflect an understatement as the showing for the CMStP&P is incomplete.

The great majority of cars included in the studies were interchanged between eastern and western lines at Chicago, Ill., St. Louis, Mo. (including East St. Louis, Ill.), and Peoria, Ill. The Chicago interchange was over 60 percent and as much as 64 percent, including certain other junctions in the Chicago area. That at St. Louis was at least 18 percent and at Peoria 3 percent (increased to 7 percent with the addition of other interior Illinois cities). About 2.6 percent moved by car ferry across Lake Michigan. There was a negligible movement of about 0.3 percent or less through southern territory. A fairly substantial number, 7 or 8 percent, were interchanged by the Wabash at Kansas City, Mo., and other midwestern points.

About 27 percent of the traffic received a one-line haul west of the interchange points. Principally, these were movements over the AT&SF and the CMStP&P, but it appears logical also here to take account of the CB&Q, a subsidiary of the GN and the NP, and the StLSW and the T&NO, which are parts of the SP system.

The traffic in which the midwestern lines participate is interchanged between them and the defendants largely at Council Bluffs, Iowa (including Omaha, Nebr.), Kansas City, Mo.-Kans., El Paso, Tex., the Twin Cities (Minnesota Transfer, Minneapolis, and St. Paul, Minn.), and Colorado junctions (chiefly Denver and Pueblo). The defendants' study shows that average western hauls of this traffic in 1953 were 548 miles over midwestern lines and 1,666 miles over transcontinental lines. The study of the midwestern lines for that year shows an average haul of 702 miles for them and 1,603 miles for transcontinental lines.

The movements to and from the subdivisions of eastern territory were represented by the following percentages of total tons: central, 55.1; trunkline, 35.5; New England, 9.4. The revenue percentages were about the same. From the defendants' 1953 study it appears that about 36 percent of the cars originated or terminated in the metropolitan districts of the four major Pacific ports: Seattle, Wash., Portland, Oreg., and San Francisco and Los Angeles, Calif.

More than 90 percent of the movement between eastern and mountain-Pacific territories is in boxcars and refrigerator cars. The corresponding percentage for the more diversified traffic to and from midwestern territory is 82 percent. The percentages for the various types of equipment are shown in the following table:

24

| Type of car | Between mountain Pacific territory and— | |
|---|---|---|
| | Eastern territory | Midwestern territory |
| | *percent* | *percent* |
| Box | 61.27 | 60.75 |
| Flat | 2.38 | 3.10 |
| Stock | .14 | 3.78 |
| Gondola or hopper | 4.96 | 7.47 |
| Tank | 1.35 | 3.60 |
| Refrigerator | 29.84 | 21.21 |
| Special | .06 | .09 |
| | 100.00 | 100.00 |

*Traffic between transcontinental and midwest territories.*—Because of differences in the scope of the traffic studies of the defendants and the midwestern lines, it is impossible to estimate closely the volume of movement and revenue involved in Sub-No. 1. The midwestern study indicates a

movement of 330,000 cars between these territories in 1935 and a total revenue of $264.6 million. The broader study of the defendants includes the inter-mountain region not covered by this complaint and railroads which are not complainants therein. It shows a movement of 787,549 cars in 1953 and total revenue of $634.8 million. It appears from the two studies that the directional movements were about 60 percent eastbound and 40 percent westbound.

The midwestern study shows the following distribution of volume and revenue among the primary commodity classes:

| Class | Cars | Revenue |
|---|---|---|
| | *Percent* | *Percent* |
| Products of agriculture | 18.5 | 15.6 |
| Animals and products | 6.9 | 5.0 |
| Products of mines | 6.4 | 5.0 |
| Products of forests | 30.3 | 28.7 |
| Manufactures and miscellaneous | 34.5 | 43.3 |
| Forwarder traffic | 3.4 | 2.4 |
| | 100.0 | 100.0 |

The most important points of interchange between the defendants and the midwestern lines are (in the order of importance) Kansas City, Council Bluffs, El Paso, Twin Cities, and Colorado Junctions. According to the midwestern lines' study the average actual haul per car for them on this traffic was 695 miles and for the defendants, 1,583 miles. The revenue was divided 26.58 percent to the midwestern lines and 73.42 percent to the defendants. The average actual hauls shown in the defendants' study were 620 miles for the midwestern lines and 1,488 miles for the defendants, and the respective shares of revenue were 25.9 percent for the former and 74.1 percent for the latter.

The revenue interests of individual carriers in the midwestern-mountain-Pacific traffic, according to the defendants' study, are shown below.

*Defendants*

| | Revenue (000) | Percent |
|---|---|---|
| UP | $129,592 | 27.6 |
| SP | 107,873 | 22.9 |
| AT&SF | 75,913 | 16.1 |
| GN | 38,649 | 8.2 |
| NP | 37,842 | 8.0 |
| D&RGW | 29,395 | 6.3 |
| CM&StP | 16,592 | 3.5 |
| WP | 15,759 | 3.4 |
| Others | 18,714 | 4.0 |
| | 470,329 | 100.0 |

*Midwestern lines*

| | Revenue (000) | Percent |
|---|---|---|
| CB&Q | $37,083 | 23.1 |
| CRI&P | 22,794 | 14.2 |
| C&NW | 16,185 | 10.1 |
| MP | 16,019 | 10.0 |
| T&P | 10,915 | 6.8 |
| T&NO | 7,799 | 4.9 |
| StLSF | 5,631 | 3.5 |
| IC | 4,890 | 3.1 |
| MKT | 4,375 | 2.7 |
| StLSW | 3,448 | 2.2 |
| CGW | 2,087 | 1.3 |
| GM&O | 1,627 | 1.0 |
| M&StL | 1,073 | 0.7 |
| GB&W | 105 | 0.1 |
| Others | 26,254 | 16.3 |
| | 160,285 | 100.0 |

For the purpose of these proceedings 3 subdivisions of midwestern territory have been designated, as follows: Midwest east—Iowa, Wisconsin, the Upper Peninsula of Michigan, southeastern Minnesota, northwestern Illinois, and northern Missouri; Midwest southwest—Arkansas, Louisiana, Oklahoma, Texas, southern Missouri, and eastern New Mexico; and Midwest northwest—Kansas, Nebraska, South Dakota, southwestern Minnesota, and eastern Colorado. The percentages of total movement to and from these subdivisions were, east 60 percent, southwest 33 percent, and northwest 7 percent.

26 *The present divisions and their history.*—The transcontinental joint-rate structure is the oldest in the United States. The joint rates between the Pacific coast and midwestern territory date from 1874, 5 years after the completion of the first transcontinental rail route. Those between official territory and the Pacific coast were established in 1887.

For most of that time the divisions of these rates have been a source of recurring controversy between the defendants, on the one hand, and the midwestern lines and the complainants, on the other. The earliest divisions were based upon some form of constructive mileage prorate in which the factors for distances west of the Missouri River were 150 percent of actual distances and those east thereof were actual distances. Because of their long hauls this basis was highly favorable to the defendants,[6] who also contended that their distance inflation was necessary to compensate them for adverse mountain grades and light density of population and traffic. These views have always been dominant in the thinking of the defendants and are reflected in their contentions here.

There were numerous changes of a minor nature in the divisions of the rates to and from official territory be-

[6] See appendix A.

tween 1887 and 1921. During much of that period the eastern lines' divisions of rates to and from New York City and other points on the Atlantic seaboard were 25 percent (via Chicago), 27.5 percent (via Peoria), and 29 percent (via St. Louis). How these divisions were arrived at is not known. It may be only a coincidence that the Chicago division was equivalent to a constructive mileage prorate with a western inflation of 25 percent.

In 1922, the complainants and the defendants entered into a formal agreement concerning the divisions of the eastern transcontinental rates, as well as the measure of some of the rates. The eastern shares were increased but in such slight amounts, in our opinion, as not to support the contention of the defendants that they were forced to yield to the superior bargaining power of the complainants. The eastern divisions established by that agreement and now in effect are shown below:

27

| Territorial group | Division east of — | | |
|---|---|---|---|
| | Chicago | Peoria | St. Louis |
| | *Percent* | *Percent* | *Percent* |
| New England-seaboard | 27.5 | 31 | 31.5 |
| Trunkline interior (Syracuse, N. Y.) | 25 | 28.5 | 29 |
| Bessemer, Pa. | 18 | 21.5 | 21.5 |
| Buffalo-Pittsburgh | 16.5 | 20 | 20 |
| Cincinnati-Detroit (northern) | 16 | 19.5 | 19.5 |
| Cincinnati-Detroit (southern) | 13 | 16.5 | 16.5 |

The above divisions are subject to certain maxima which need not be specified here. They apply generally on all traffic. There are certain special divisions on lumber to central territory which are usually higher than the general percentages. To the remainder of official territory, special divisions apply only on rough lumber. On fresh fruits and vegetables to New England and New York City pier

stations, a deduction of about 6 cents per 100 pounds before prorating accrues to the eastern lines as a result of the decision in *Erie R. Co.* v. *Alabama &* v. *Ry. Co.*, 98 I.C.C. 268. Thereby, for example, the complainants receive 29.3 percent of the rate on lettuce from the Pacific coast to New York City, instead of the general percentage of 27.5 percent.

The percentages of the defendants from eastern-transcontinental rates to and from such points as Phoenix, Ariz., Spokane, Wash., and Reno, Nev., are the same as those of the rates to and from the Pacific ports. Apparently all of transcontinental traffic is thus blanketed. Consequently the revenue received by the defendants from shipments to or from the intermediate territory is relatively greater than the amounts which they receive on traffic to or from the port districts. Spokane, for example, is 295 miles east of Seattle, but the defendants' percentage of rates on Spokane traffic is the same as that on Seattle traffic. That percentage, applied to rates to and from New York City via Chicago and the Twin Cities, is 60.2 for the service to and from the latter point. The difference of 295 miles before mentioned is 17 percent of the distance from the Twin Cities to Seattle and 7 percent of the distance from New York City to that point.

Since the preponderance of the midwest-transcontinental movement is to and from midwest-east territory, as before pointed out, the divisions received by the midwestern lines for their relatively short hauls between the Missouri River terminals and the Twin Cities, on the one hand, and
28 Chicago, St. Louis, and other intermediate points, on the other hand, have long been a source of dissatisfaction to the midwestern lines. At the time when divisional controversies could only be settled by agreement, the defendants were able to prevail on the midwestern lines to accept their time-honored constructive mileage prorate with the 50-percent inflation of the defendants' distances. Under this method the rates between transcon-

tinental territory and Chicago were divided by apportioning 15 percent for the haul between the Missouri River or the Twin Cities and Chicago, and 11 percent between the Missouri River and St. Louis.

In 1923 the Commission on its own initiative instituted an investigation of the lawfulness of divisions of railroad rates in the western district in docket No. 15234. There were hearings in that proceeding concerning the reasonableness of the transcontinental-midwest divisions, but before submittal of the issues to the Commission for determination the two contending groups reached an agreement, effective July 1, 1925, under which the midwest divisions were generally increased 10 percent, yielding about $3 million additional revenue to the midwestern lines. This agreement had the effect, among other things, of raising the midwest Chicago division of 15 percent before mentioned to 16.5 percent and the St. Louis division of 11 percent to 12.1 percent.

Following that action the investigation in No. 15234 was not discontinued, however, and in 1929 the Commission set it for further hearings concerning the transcontinental-midwest divisions. A decision on the further hearing was rendered in 1934, *Divisions of Freight Rates*, 203 I.C.C. 299, in which, after referring to some shortcomings in the evidence, the Commission stated its conclusions, at page 335, as follows:

> However, this case must be decided on the basis of the evidence of record, voluminous but most unsatisfactory; and there is no other way of deciding it than by the exercise of general judgment after consideration of this evidence, such as it is. Upon consideration of all the evidence of record, we are unable to find that the divisions of the transcontinental rates are unlawful.

Again, in 1940, the Commission reopened No. 15234 for the purpose of again considering the transcontinental-midwest divisions, but after the start of the further hear-

ings war conditions made further consideration of the question impracticable and No. 15234 was later discontinued "without prejudice."

In describing the divisions which resulted from the 1925 agreement the Commission in its 1934 decision said
29 that "on the whole they happen to be slightly less than would result from a weighted-average mileage prorate in which actual distances east of the gateways are used in connection with a constructive distance of 1.25 miles for each mile west thereof." The defendants' 1953 traffic study indicates that, similarly measured, the average inflation west of the gateways would now be 19 percent. In some instances, however, the defendants' divisions are less than they would be under a straight mileage prorate. For example, the divisions of rates between Dallas, Tex., and Seattle via Kansas City are 30 percent south and 70 percent west of the interchange point, the respective distances being 473 miles and 1,906 miles. A mileage prorate would produce percentages of 20.3 south and 79.7 west.

Like the official-transcontinental divisions, the midwestern-transcontinental divisions are blanketed over all of transcontinental territory. Accordingly, for example, on a shipment from Chicago to Boise, Idaho, via Council Bluffs the Union Pacific receives the same division of 83.5 percent as it receives on a shipment to Seattle, 482 miles farther. This makes the Boise divisions equivalent to those which would result from a constructive mileage prorate using a constructive distance of 1.85 miles for each actual mile west of Council Bluffs.

The midwestern-transcontinental divisions of rates to and from Chicago, St. Louis, and other points of interchange with eastern lines are also used in subdividing the western shares of the official-transcontinental rates. Thus, the western division of 72.5 percent of the rates between New York City and Pacific ports is subdivided by allowing the midwestern lines for the service between Council Bluffs

and Chicago 12 percent (16.5 percent of 72.5 percent) and the defendants 60.5 percent (83.5 percent of 72.5 percent). When the movement is via St. Louis and Kansas City, for the haul between those points the midwestern lines receive 8.3 percent (12.1 percent of 68.5 percent) and the defendants 60.2 percent (87.9 percent of 68.5 percent).

The divisions of joint rates to and from Montana points via northern gateways do not conform to any uniform pattern, and in some instances the general basis is in dispute. It is therefore not feasible to describe them here in a helpful manner.

## RELATIVE COST OF SERVICE

In one of the first major proceedings involving divisions after the enactment of section 15(6) in 1920, *New England Divisions,* 66 I.C.C. 196, 199, (1922), the Commission made the following statement, which has been frequently quoted:

> Summing up this phase of the matter, we are of the opinion that our power over divisions is founded upon the public interest; that the carriers are mutually dependent parts of the transportation system; that the public interest requires that all essential parts be maintained, so far as possible, in effective working condition; that the relative amount and cost under economical and efficient management of the service rendered is a prime factor in determining the fair and equitable share of joint revenue which each carrier shall receive; and that included in such cost is a due proportion of the burden of maintaining the financial integrity and credit of the carrier.

At that time and for some years later ascertainment of relative cost was difficult because sound methods of such ascertainment were lacking. Recognition of the significance of cost in prescribing comprehensive rate structures, such as those of class rates, when comparative transportation conditions in two or more extensive territories must be

considered, led to the formulation by our cost finding section of Rail Form A, which has been widely used as an acceptable means of comparing relative transportation costs.

A large part of the record in the instant cases pertains to relative costs of service and raises a question as to the extent to which Rail Form A computations reliably indicate such costs without extensive modifications and substitutions. In general, the complainants and the midwestern lines rely on that form, seeing no need for substantial departures therefrom, while the defendants urge that, although Rail Form A is basically useful, there is an imperative need for complicated special supplemental studies and substitutions to adopt it to the distinctive characteristics of transcontinental traffic.

Each of the groups presented cost studies based in varying degrees on Rail Form A and used these in formulating scales of costs considered useful to some extent for determining divisions. For purposes of comparison representative distances for the traffic to and from official territory are 600 miles by carriers in that territory, 700 miles by midwestern lines and 1,600 miles by transcontinental lines. There are shown below the percentages for those distances which would result from the above-mentioned scales:

| | Eastern | Western |
|---|---|---|
| | *Percent* | *Percent* |
| Complainants' study ..... | 26.7 | 73.3 |

31

| | Eastern | Mid-western | Mountain Pacific |
|---|---|---|---|
| | *Percent* | *Percent* | *Percent* |
| Midwestern Lines' study .... | 25.5 | 23 | 51.5 |
| Defendants' study ..... | 22.9 | 17.2 | 59.9 |

A similar comparison relating to midwest-transcontinental divisions shows representative distances of 700 miles for midwestern lines and 1,600 miles for those in mountain-Pacific territory. The percentages for such distances under the scales of those carriers are as follows:

| | Midwestern | Mountain Pacific |
|---|---|---|
| | *Percent* | *Percent* |
| Midwestern lines' study ..... | 32.4 | 67.6 |
| Defendants' study ..... | 27.8 | 72.2 |

The complainants applied Rail Form A to the accounts of the railroads in the eastern and western districts, and used those applications to devise cost scales for the two districts in 50-mile blocks for different types of equipment with various loads shown in their traffic study for October, 1953. Later, they submitted another scale based on defendants' revised traffic sample. The factors shown for the eastern lines in this scale for distances up to 1,000 miles are on the average approximately 25 percent higher than those for the western carriers. The underlying costs are on the fully distributed basis, including a 6-percent return on the Commission's elements of value, less depreciation, and excluding passenger and less-than-carload deficits. If divisions were based on this scale, the complainants on an average would receive 29.5 percent of total revenue instead of 24 percent as settled. It is this showing upon which the complainants urge that divisions should be prescribed so as to afford them 32 percent of the total official-mountain-Pacific revenue taking into account the rise in their costs since 1957.

In our opinion the complainants' study, based as it is on the single-test period for October 1953, obscures seasonal characteristics inherent in such a study, particularly in the movement of perishable commodities among others.

32 Some recognition of this deficiency is to be found in their own evidence. The use of costs of the eastern district only, i.e., excluding those of the Pocahontas region, is also open to serious question. Although it would be difficult to determine the definite impact of this exclusion, it seems likely that the costs shown for the complainants were thereby increased at least slightly. We agree that there was inconsistency in including costs of the railroads in the New England region, whose interest in this traffic was approximately 2 percent, and excluding the Pocahontas lines with a share of 5 percent.

The midwestern lines applied Rail Form A to the operating expenses and statistics of each group of railroads separately for 1953, 1954, and 1955 to develop group fully distributed costs, including less-than-carload and passenger deficits, and return at 4 percent on the Commission's elements of value after Federal income taxes. The groups were as follows: eastern district, Pocahontas region, the principal midwestern complainants (then 12 in number but reduced to 10 by subsequent mergers), and the principal transcontinental defendants. These unit costs, by years, were applied to traffic units for the same years taken from our waybill statistics. The traffic included was to and from transcontinental territory only, and no cognizance was taken of statistics of carriers in midwestern territory other than the 12 above referred to. This study shows cost percentages for participants in official-transcontinental traffic as follows: Eastern, 24.87; midwestern, 22.51; transcontinental, 52.62. The respective as-settled revenue percentages shown in the study were 21.63, 19.78, and 58.59. For midwestern-transcontinental traffic this study shows the following cost percentages: midwest, 32.58; transcontinental, 67.42. The respective as-settled revenue percentages were 26.77 and 73.23. The midwestern lines also devised two divisional scales, based on their cost computations, one for official-transcontinental traffic and the other for midwestern-transcontinental traffic. The first of these is a 3-

way scale, in which for distances up to 1,000 miles the eastern factors average approximately 18 percent higher than the western factors. In their 2-way scale for midwestern-transcontinental traffic the two sets of factors are substantially equal. The limitation of the studies to the 10 principal complainants in Sub-No. 1 results in an incomplete showing of comparative transportation costs as between all the major railroads in midwestern territory and the other contending groups.

We turn now to the defendants' cost studies. In their suggested 3-way scale for official-mountain-Pacific
33 traffic the factors in the first 10 hundred-mile blocks for the mountain-Pacific carriers on the average are 18 percent higher than those for the eastern lines. In the 2-way scale the mountain-Pacific factors are 31 percent higher than those for the midwestern railroads.

The defendants' studies indicate that the revenue now received by carriers in the three territories from the divisions under consideration amounts to 47 percent of the total carload freight revenue of the defendants, 15 percent of that of the midwestern lines, and 6 percent of that of the complainants. The percentage relations to total ton-miles are approximately the same, except that in midwestern territory the ton-mile percentage is 19. The defendants emphasize these figures for several reasons. They find support therein for their assertion that any changes in the present divisions will have much more important consequences for them than for their opponents. They urge also that, since Rail Form A reflects conditions affecting average movements, it is essential to make allowance for the fact that transcontinental traffic accounts for a much larger proportion of defendants' total freight business than it does for the corresponding totals of the midwestern lines and the complainants.

The defendants concede upon the showing in their cost studies that the application of Rail Form A without ad-

justments produces costs for mountain-Pacific railroads which are substantially accurate, but argue from their studies that the actual costs in official territory are 19 percent below the Rail Form A unadjusted costs and that those in midwestern territory are 20 percent below.

For a proper application of the principles of Rail Form A, defendants undertook "the assembly in full detail of the operating service units which measure the amount and kind of service rendered on a representative sample of transcontinental movements, and the application to these service units of unit costs developed through Rail Form A, with substitution of direct costs wherever proper and feasible."

To assemble the operating service units the defendants used a subsample of the sample of individual carload movements in their 1953 traffic study. The selection was by a scientific process and resulted in the designation of 7,380 carloads as representative, 3,226 carloads between official and mountain-Pacific territories and 4,154 between midwestern and mountain-Pacific territories. Some of defendants' officials then endeavored to ascertain, as best they could, the probable routes traversed in detail by the
34 sample care in each of the territories in order to estimate the extent of branch-line movement, the comparative use of way and through trains, origin, destination, and interchange switching, as well as other services. Data for seven of the sample cars were presented in an exhibit to illustrate the methods followed in computing costs for the entire sample. In the defendants' initial study operating expenses for 1953 were the basis of the computation. Later in the hearings the defendants presented another study, which is similar in a general way to the first but is marked by some important differences.

The end product of the defendants' first study was a purported showing that on cost proportions the revenue from the 7,380 carloads would have been divided as fol-

lows: mountain-Pacific carriers, 63.25 percent; midwestern carriers, 22.67 percent; eastern carriers, 14.08 percent. The actual shares of the revenue as settled were 63.65 percent to the mountain-Pacific carriers, 22.99 percent to the midwestern carriers, and 13.36 percent to the eastern carriers. In the 1956 study, based on statistics for that year, the showing of revenue divided on cost proportions was as follows: mountain-Pacific, 63.82 percent; midwestern, 21.61 percent; eastern, 14.57 percent. The shares as actually settled were: mountain-Pacific, 63.76 percent; midwestern, 22.24 percent; eastern, 14.00 percent.

By way of rebuttal of the showing in the defendants' 1953 cost study, the midwestern lines made a study of line-haul services which could be measured from actual records, including wheel reports, dispatchers' train sheets, and time slips for trains in which the cars included in the defendants' sample were moved. They also made a study of the switching minutes in terminal service attributable to a random subsample of that sample. The items of line-haul cost embraced in the midwestern lines' special study represent about 25 percent of the total of such items, and the elements of terminal service studied are about 50 percent of the total for such service. The study purports to show that if the terminal expense of the midwestern lines is adjusted to reflect the distinctive conditions disclosed by the study, the corresponding unadjusted figure would be increased 20 percent, and the adjustment in the line-haul expense, a much larger figure, would produce a reduction of 4 percent. The net result of the adjustment for terminal and line-haul expense combined is an increase of 0.1 percent, which is negligible. The midwestern lines therefore argue that, insofar as it is possible to make a direct assignment of costs to individual shipments, the unadjusted figures arrived at by application of Rail Form A must be accepted as accurately measuring the proportionate expense to the midwestern lines

in their handling of intraterritorial traffic between points on their lines and those of the defendants.

The evidence pertaining to the cost studies of the defendants and the midwestern lines was extensive. In addition to the detailed testimony of the cost analysts who planned the studies and supervised their compilation, evidence was presented by many other witnesses concerned with operating, statistical, engineering, and mathematical aspects of the projects. In criticism of the studies the complainants and the midwestern lines also introduced detailed evidence of the same general nature and considerable bulk.

The preparation of the studies entailed the accumulation of voluminous working papers containing underlying figures and other data. The parties made available to one another a considerable part of these working papers for inspection or copying; if that had not been done, the studies would have been largely unintelligible. In later stages of the hearings, copies of numerous working papers were reproduced as exhibits, but apparently the greater part of the working papers were not made a part of the record. Counsel were unwilling to agree to a stipulation that all such papers be considered as in evidence. The defendants' counsel thereupon sought to introduce numerous working papers not already in the record, but this evidence was excluded for reasons stated by the hearing examiners in their recommended report. We affirm that ruling.

As previously mentioned, defendants' cost study included a number of substitutions and adjustments to Rail Form A costs. Some of these are appropriate refinements of the Rail Form A procedure while others are acceptable alternative methods of computing costs. However, some we could not accept as being proper and others were not or could not be uniformly applied to each territory.

We now consider six departures from Rail Form A costs in the defendants' cost study which we believe to be im-

portant, having significant cost consequence, and present our restatement of that study.

(1) For use in applying Rail Form A, our cost finding section has published figures based on a 7-day study of empty-return ratios by territories. The defendants, however, substituted ratios developed from information available to them in their own operations for those resulting from the 7-day study. Their empty-return ratios were developed as follows: for general purpose
36 boxcars on studies in mountain Pacific and midwestern territories; for refrigerator cars on the loaded and empty car-miles for four transcontinental refrigerator car owners; for potash cars on the experience of the AT&SF; and operating opinion for automobile loader, auto parts, and private cars. The great bulk of the traffic at issue moves in boxcars and refrigerator cars and it is the adjustment in the empty ratios of these cars which has a material effect on relative costs.

The empty-return ratios used for refrigerator cars were based on a study of the movements of cars owned by PFE, WFE, SFRD, and NP. This study was attacked on the following bases: (*a*) the study included car movements not at issue in this case; (*b*) some refrigerator car movements at issue in this case were not included in the study, for instance, 32 percent of midwest-mountain-Pacific refrigerator traffic is handled in cars of other ownerships than the four studied, and, (*c*) there is a duplication in the mountain-Pacific ratio because the car movements in gathering areas are counted twice.

The defendants made a study of the empty return ratios for general purpose boxcars in mountain-Pacific territory by tracing a one-tenth of 1 percent sample of loaded cars which crossed the mountain-Pacific border for the year ended August 31, 1955. They also made a study of empty-return ratios for the Midwest based on the midwestern portion of four transcontinental roads, and used the re-

sultant ratio for the eastern district also. They were unable to make studies for the other territories comparable in scope to the one in mountain-Pacific territory because the data were not available to them.

A comparison of the ratios obtained by these special studies and the ratios from the 7-day study follows:

| | Defendants' study | 7-day study |
|---|---|---|
| | *Percent* | *Percent* |
| Mtn.-Pacific roads | 36 | 32 |
| Tcl. split roads in mtn.-Pac. territory | 36 | 38 |
| Tcl. split roads in Midwest | 18 and 22 | 38 |
| Midwestern roads | 18 and 22 | 33 |
| Eastern roads | 18 | 36 to 44 |

In the mountain-Pacific territory where adequate data were available to the defendants their special study results are more comparable to the 7-day study results than in the other territories. The principle underlying de-
37 fendants' studies was contested by the midwestern cost witness who stated that boxcars and other general purpose cars are operated in a pool by the railroads and are available for loading all kinds of commodities throughout the railroads' systems and that there is no logical basis for associating any particular empty movement of general purpose cars to any specific traffic.

In this case where the relationship of one territory to another is of critical importance it is requisite that any special studies be made on a comparable basis in each territory. The defendants' empty-return study in the Midwest was inadequate and there was no study in the East; therefore, to obtain comparable data in each territory it is necessary to use in our restatement the empty-return ratios from our 7-day study.

(2) The defendants consider that Rail Form A is deficient in not producing an accurate separation of constant and variable costs of maintenance of way and structures operating expenses (running), and return on road-running facilities.

Defendants, in computing the costs of maintenance of way and structures operating expenses (running), and return on road-running facilities, assign to each mile of track a constant amount and assign to variable or out-of-pocket costs the remaining roadway expenses and return. The constant amount per mile of track for the track expense accounts (202-221) was $989 in all territories, then increased for the other maintenance of way expense in each territory to become for the year 1956 in mountain-Pacific, $1,955; in midwest, $1,811; and in official, $2,045. The constant part of 6 percent return on investment was computed at $1,373 in all territories and when expanded to provide for income taxes in each territory became: mountain-Pacific $2,500, midwest $2,445, and official $2,417.

The defendants' position is that—

> the constant portion of the maintenance costs (i.e.; the portion of the maintenance unaffected by traffic volume) is most closely approximated by the maintenance expenditures on lines of very low traffic volume. Such minimum expenses (per mile of track) were ascertained from correlation studies relating the maintenance costs to the traffic. Further information was obtained from submissions to this Commission in abandonment proceedings and from the examination of the maintenance cost per mile for class II and class III roads.

38 Further confirmation was obtained in studies of 60 AT&SF branch lines. The level of constant or minimum return per mile of track was developed by dividing 50 percent of the United States return on road property

(before Federal income taxes) by the corresponding miles of track. The reasonableness of the resulting level of constant return per mile of track was checked by independent tests, including analysis of investment accounts of light density class II roads and light density AT&SF lines in mountain-Pacific and midwestern territories.

Defendants state that Rail Form A assigns to branch-line traffic in the Midwest only the equivalent of $39 for the constant expense of maintenance (accounts 202 to 221) per mile of branch-line track as compared with $936 actually expended. They do this for the purpose of proving that the Rail Form A procedure does not properly allocate costs between branch-line and through-line traffic and overstates the costs of the traffic here at issue which moves principally over through lines in the Midwest. The $39 is computed in the following manner:

| | |
|---|---|
| 1. Total of accounts 202 to 221, midwestern roads, year 1956 | $125,475,940 |
| 2. Constant portion—20 percent | $25,095,188 |
| 3. System trailing gross ton-miles, excluding cabooses (000) | 273,891,337 |
| 4. Constant cost per MGTM (line 2 ÷ line 3) | $0.09162 |
| 5. Trailing gross ton-miles on branch lines (000) (calculated) | 8,465,558 |
| 6. Constant cost assigned to branch lines (line 4 × line 5) | $775,614 |
| 7. Miles of branch-line tracks | 19,667 |
| 8. Constant per mile of branch-line tracks (line 6 ÷ line 7) | $39 |

Constant costs are incurred on behalf of the operation as a whole, cannot be associated on any rational basis with any kind of service units, and therefore are unrelated to gross ton-miles. For this reason the amount of constant

assigned to branch lines on line 6 and the constant cost of $39 per mile on line 8 are without real meaning and cannot be accepted. Rail Form A makes no separation between main line and branch line. These constant expenses produced by Rail Form A, if allocated equally over every mile of track in the Midwest, both main and branch, would amount to $359 per mile.

39 In lieu of the Rail Form A method of computing constant expense and return which vary among the railroad groups when reduced to a per-mile-of-track basis the defendants used a constant amount of dollar cost per mile for roadway constant expense, as well as return, which is the same for all miles of running track of all descriptions in all sections of the United States. The constant expense per track mile of $989 was determined from a multiple regression formula applied to the track accounts 202-221, track miles, and gross ton-miles of 28 class I freight railroads covering the period 1951 to 1957. The constant amount of return per track mile of $1,373 was computed by taking 50 percent of the return on roadway running facilities for all class I railroads in the United States and dividing by the number of miles of track owned.

The multiple regression formula has been tested by applying to it a variance analysis with the following results:

(1) When the variation explained by gross-ton-miles alone was subtracted from the variation explained by both gross-ton-miles and miles of track, the result showed that 84.4 percent of the variation was explained by gross-ton-miles, 7.1 percent by miles of track, and 8.5 percent (standard error) was unexplained; and (2) when the variation explained by miles of track alone was subtracted from the variation explained by both gross-ton-miles and miles of track, the result showed that 71.8 percent was explained by miles of track, 19.7 percent by gross-ton-miles, and 8.5 percent was unexplained.

These results are unsatisfactory. They are due to the fact that the influence of the two variables is not mutually exclusive, and demonstrate that the multiple regression formula proves little in the absence of corroborating evidence. The other evidence consists of an analysis of the returns to abandonment questionnaires in 88 cases filed between 1954 and 1957, a study of maintenance expenses of 143 class II roads, and a study of light density branch lines on the AT&SF.

The defendants found that the annual average cost for track maintenance (Accounts 202-221) in the 88 abandonment cases was $948 per mile. They point out that this understates the cost of continued maintenance of low density lines because normal business considerations result in the deferral of maintenance on lines that have become candidates for abandonment. This evidence supports the conclusion reached by their correlation analysis of the constant maintenance cost per mile on 28 class I freight railroads. This data was arrayed by midwestern
40 complainants in order of density, with the omission of one line which was considered to be unrepresentative because it had 48 bridges in 34 miles, as follows:

*Defendants' study of abandonment dockets separated by density groups*

| Gross-ton-miles per mile- | Number of abandonments | Expense per track-mile |
|---|---|---|
| Under 25,000 | 21 | $391 |
| 25,000 to 49,999 | 14 | 725 |
| 50,000 to 99,999 | 23 | 898 |
| 100,000 to 199,999 | 15 | 1,032 |
| 200,000 to 3,123,487 | 14 | 1,257 |
| | 87 | |

The above array indicates that constant maintenance expense tends to increase with density.

The defendants made an analysis of the total maintenance costs per track mile shown in the 1956 annual reports for 143 class II railroads in the lowest density group and found a cost per mile of track of $2,164, which they compare to their constant maintenance cost per track mile of: mountain-Pacific, $1,955; midwest, $1,811; and official, $2,045. They state that the figure of $2,164 contains a small proportion of variable cost and that it confirms the constant cost per mile.

The midwestern lines rearranged this data for these 143 class II railroads by density groups and by territories as follows:

*The 143 light density class II roads*

| Group (1) | No. of roads (2) | Rev. Ton-miles per mile of road (3) | M of W.&S. expense per mile of road (4) | Percent of average (5) |
|---|---|---|---|---|
| 0 to 24,999 ..... | 27 | 18,107 | $1,366 | 51 |
| 25,000 to 49,999 ..... | 25 | 42,057 | 2,174 | 81 |
| 50,000 to 99,999 ..... | 32 | 73,927 | 2,160 | 81 |
| 100,000 to 199,999 .... | 35 | 141,170 | 2,690 | 101 |
| 200,000 to 399,999 .... | 24 | 272,019 | 3,992 | 149 |
| Average ..... | | 123,833 | 2,674 | 100 |
| Official ..... | 59 | 109,290 | 2,396 | 90 |
| Midwest ..... | 43 | 135,568 | 2,355 | 88 |
| Mountain Pacific .... | 41 | 125,285 | 3,480 | 130 |
| Average ..... | | 123,833 | 2,674 | 100 |

41 These data indicate that expense per mile increases as density increases and that the expense per mile is substantially more in the mountain-Pacific than in the other two territories. It is significant that the Midwest has at the same time both the highest density and the lowest cost per mile, and that although the 41 roads in mountain-Pacific territory are of average density their cost per mile is 48 percent greater than the roads in the Midwest.

The systemwide density of traffic of the three groups of roads in thousands of gross ton-miles per mile of track in 1956 is:

| | | Percent |
|---|---|---|
| Official | 7,095 | 120.6 |
| Midwest | 4,087 | 69.5 |
| Mountain Pacific | 7,388 | 125.6 |
| Average | 5,881 | 100.0 |

The information available from both the abandonment dockets and the light density class II roads shows a definite relationship between density and constant cost per mile of track; i.e., the higher the density the greater the constant cost. The use of a United States average constant expense per track mile tends to overstate the constant cost in the midwestern territory because of its lower than average density and to understate the constant cost of the other two territories because of their higher than average density.

The United States average constant return per track mile before income taxes of $1,373 was used in all territories. The corresponding amount by territories (computed from data of record) was $1,840 for official, $1,788 for mountain-Pacific, and $1,009 for the Midwest. The use of the United States average overstates the amount of constant return in the Midwest and understates it in the two other territories.

The underlying principle used by the defendants of relating constant costs to track miles is not condemned as such, however, the manner in which it was computed and applied is questioned. The use of a United States
42 average for the constant portion of maintenance of way and structures (running) expense and return on investment has the result of ignoring or even giving a reverse effect to differences in cost among the various

territories. For this reason these costs are computed by the Rail Form A method in our restatement of defendants' cost study.

(3) In the defendants' first cost study the expense of locomotive repairs, supplies, depreciation, and return on investment associated with such expense was allocated on the basis of fuel consumption, with adjustment of return and depreciation to reflect the number of locomotive-unit miles. In their later study expense for locomotive repairs and supplies was computed on the basis of diesel-unit miles. The locomotive cost per diesel-unit mile applied in all territories was the average of all three. There is some reason to believe that the underlying number of locomotive-unit miles was not accurately assigned to the sample traffic, and we are not persuaded that the use of uniform average expense here is sound in connection with an effort to discover territorial cost differences. The testimony of a witness for complainants indicates that locomotive-unit mile costs are substantially higher in eastern territory than in western territory due, in part at least, to the larger engine districts in the West, which have the effect of increasing locomotive-miles per day.

The evidence shows three bases of computing locomotive costs: (*a*) fuel consumed, (*b*) diesel-unit miles, and (*c*) gross ton-miles. For the reasons above stated our restatement of defendants' cost study computes locomotive costs based on the gross ton-mile method as applied in Rail Form A separately for each territory. This method, we believe, produces proper and more equitable results among the territories.

(4) The defendants' cost study includes an equal amount per service unit in all three territories for group I costs, which include car repairs, depreciation, and return, on general purpose or per diem cars for the stated reason that the differences among territories in the cost per car-mile are due to conditions which are unrelated to the handling of interterritorial traffic. The other two parties state

that the group I car-mile costs for each territory as computed in Rail Form A reflect actual differences in costs in each territory which the roads in those territories must recover to come out whole.

The defendants assign as a principal cause of higher car-mile costs in the East the high proportion of gondola and hopper cars in that district. The proportion of ownership of cars is:

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| | Box | Open top G. & H. | Other |
|---|---|---|---|
| | *Percent* | *Percent* | *Percent* |
| Eastern ..... | 48 | 47 | 5 |
| Western ..... | 51 | 31 | 18 |

The defendants reason that because open-top cars make fewer car-miles per year than other type cars the repair costs per mile for open-top cars are greater. This does not quite prove their contention; in fact, the closeness of the percentages for boxcar ownership suggests that there are cars or car movements in the West other than open-top cars and boxcars which may offset the effect of open-top cars in the East.

The Rail Form A group I costs of a given road include principally car repairs, depreciation, and return on all cars owned. Per diem payments for foreign cars serving on this road are added, and per diem receipts from home cars serving on a foreign road are subtracted. The inclusion of per diem settlements adjusts the costs from the basis of cost of cars owned to the basis of cost of cars serving on the road. These latter costs are divided by the service car-miles to give a cost per car-mile. Thus, if per diem is more or less than car ownership costs, a substantial difference can result: a difference which represents actual dollars paid out or received.

In the defendants' sample of official-transcontinental traffic (not including the Pocahontas region) the relationship of the total car-miles run in each territory by cars of all ownerships was 21.4 percent in official territory and 78.6 percent in western district. The total car-miles run in all territories separated by ownership was eastern-owned cars 43 percent, western-owned cars 44 percent, and other 13 percent. Although these figures are not exactly comparable, they nevertheless support the conclusion that there is a greater use of eastern cars in the western district than there is of western cars in the eastern district.

The complainants state that one of the reasons for the higher car-mile cost in the East is the western lines' use of the eastern car fleet and to eastern lines having the repair expense incident to that use. To this the defendants reply that the fault lies in the inadequacy of the car-hire rate and should be remedied in a car-hire proceeding, not this case.

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The other major reason given for the higher car cost in the East is the greater utilization of cars in the West. Indications of this greater utilization are: (a) average miles per serviceable car-day in the West are 56.7 miles and in the East are 35.0 miles; and (b) average miles per engine district of 90.7 in the East and 109.0 in the West. It is also of interest that the average haul of transcontinental traffic is about 600 miles in the eastern district and 2,200 miles in the western district. The greater population density and congestion in the East, which is reflected in shorter engine districts, more grade crossings, and yards and metropolitan districts closer together make for lesser car utilization in terms of car-miles per day. This results in a higher cost per mile.

The evidence shows that the territorial difference in car-mile costs are the result of actual operations. They are caused mainly by geographical differences and the application of the same per diem rate to territorial groups of

carriers having different degrees of car utilization and costs. These differences are related to and partially caused by the traffic at issue.

The differences in car-mile costs among the three territories should not be concealed by using the same cost for all. Therefore, in our restatement the defendants' cost study is adjusted by using the Rail Form A car-mile cost applicable to each territory.

(5) In the defendants' 1953 study, branch-line costs were computed on a solely related basis; that is, at the level of 100 percent of operating expenses, rents, and taxes, plus 100 percent of a 6-percent return on net book investment after income tax. In their 1956 study, however, this basis was limited to traffic originating on their branch line "on which 50 percent or more of the cars originated and terminated are related to transcontinental traffic." The nature of this relationship was not disclosed in the defendants' study, but it later appeared that the cars counted included, not only those actually used for transcontinental traffic, but certain others containing "raw materials one step back from the manufacturing process"—logs, pulpwood, grain, sugar beets, and even coal, sand, fluxing stone, and fuel, as deemed appropriate by the persons who were called on for this information.

We are unable to accept the theory that a proportion of 50 percent of such traffic on a branch indicate such a degree of dependence thereon as to support the defendants' differentiation. Taking into account the broader category of commodities above mentioned is inconsistent with the concept of a branch line used exclusively for a given purpose.

The amount of this solely related cost included in the defendants' 1956 study which represents about 0.38 percent of their cost proportions on official-mountain-Pacific traffic and about 0.29 percent of their cost proportions on midwest mountain-Pacific traffic, has been deleted in our restate-

ment in order to place all three territories on a comparable out-of-pocket basis.

(6) In arriving at an allowance for return on investment in property devoted to transportation service, consideration must be given to the amount of the proper investment base, the rate of return, and the treatment of Federal income taxes. The parties are in disagreement on each of these points. Of these the first is the most important and will be discussed infra in connection with revenue needs.

The defendants computed return on investment at 6 percent after Federal income taxes which represents approximately 10 to 11 percent before Federal income taxes, depending on territory, the complainants at 6 percent before income taxes, and the midwestern carriers at 4 percent after income taxes. Our cost finding section, for purposes of its studies, has computed return at 4 percent after income taxes. This rate for many years has represented the historical average for class I line-haul railroads as a whole. Although there is evidence tending to show that the long-term cost of capital is not less than 6 percent, this fact is principally relevant to total revenue needs. For the present purpose of cost ascertainment we regard 4 percent as proper.

Concerning the treatment of income taxes, on a similar point in *Increased Freight Rates, 1951*, 284 I.C.C. 589, 617, this Commission said:

> While fully cognizant of the magnitude of petitioners' estimates of increased Federal income taxes otherwise, we see no alternative to following the decisions of the Supreme Court, and considering in a rate proceeding that such taxes are a proper charge to operations and deductible as such in arriving at a fair return.

The same principle, we believe, must be applied to divisions. Accordingly, for purposes of comparison among

territories Rail Form A out-of-pocket costs reflecting
46 a 4-percent return on elements of value, after Federal income taxes, is used in our restatement of defendants' cost study.

We are convinced that the defendants' cost studies understate the costs in eastern and midwestern territories. Furthermore the cost studies of both the defendants and the midwestern lines indicate that the complainants are entitled to higher divisions. That of the defendants points to an increase of at least 4 percent in eastern revenue, but according to the midwestern study an increase of nearly 15 percent therein would be justified.

Giving effect to our criticisms of six of the defendants' departures from Rail Form A costs above stated the following table shows our restatement. Also shown are the results of defendants' cost study and Rail Form A costs; and for comparative purposes the revenue as settled based on defendants' study. The Rail Form A costs (column 4) are at the out-of-pocket level for the year 1956, including a 4-percent return after Federal income taxes on elements of value and freight-train car empty-return ratios from the 7-day study. Also, they are based on the defendants' railroad groupings except that the unit costs of the so-called split roads, which operate both in mountain-Pacific and midwestern territories, were applied on a system average basis. All costs are on the so-called revenue territory basis and the percentages reflect aggregate out-of-pocket costs in each territory.

| | Out-of-pocket costs | | | |
|---|---|---|---|---|
| | Revenue as settled (1) | Defendants' cost study (2) | Restatement (3) | Rail Form A (4) |
| Official mountain-Pacific traffic: | | | | |
| Mountain-Pacific territory ..... | $12,525,265 | $ 8,916,391 | $ 7,961,945 | $ 8,052,875 |
| Midwestern terr. .. | 4,166,823 | 2,646,074 | 2,915,018 | 3,100,293 |
| Official terr. ..... | 4,665,244 | 3,619,872 | 3,833,762 | 4,065,965 |
| Total ..... | $21,357,332 | $15,182,337 | $14,710,725 | $15,219,133 |
| Midwest-mountain Pacific traffic: | | | | |
| Mountain-Pacific territory ..... | $11,633,046 | $ 7,576,989 | $6,787,337 | $ 6,897,880 |
| Midwestern terr. .. | 4,327,628 | 2,929,720 | 3,121,143 | 3,208,419 |
| Total ..... | $15,960,674 | $10,506,709 | $9,908,480 | $10,106,299 |
| Official mountain-Pacific traffic: | | | | |
| Mountain-Pacific . | 58.7 percent | 58.7 percent | 54.1 percent | 52.9 percent |
| Midwest ..... | 19.5 | 17.4 | 19.8 | 20.4 |
| Official ..... | 21.8 | 23.9 | 26.1 | 26.7 |
| Total ..... | 100.0 percent | 100.0 percent | 100.0 percent | 100.0 percent |
| Midwest-mountain-Pacific traffic: | | | | |
| Mountain-Pacific . | 72.9 percent | 72.1 percent | 68.5 percent | 68.3 percent |
| Midwest ..... | 27.1 | 27.9 | 31.5 | 31.7 |
| Total ..... | 100.0 percent | 100.0 percent | 100.0 percent | 100.0 percent |

The difference between defendants' cost study (column 2) and our restatement (column 3) consists solely of the six adjustments previously discussed. All of the other refinements to and departures from Rail Form A costs, as computed by defendants, remain in our restatement. Their aggregate cost effect is measured by the difference between our restatement (column 3) and Rail Form A costs (column 4). These other refinements in defendants' cost study include gathering area studies, interchange and intertrain

and intratrain switching, train crew wages, miscellaneous train expenses, train fuel, other running (group III) costs, terminal adjustment, short-line railroad costs, special service, and other lesser items. The special services include eastern produce terminals, transloading, reconsignments and diversions, floating, et cetera. Some of these items are discussed below:

48 (a) *Gathering studies.*—A total of 30 special gathering studies were made by the defendants, and apparently these were started in an early stage of their preparation before the parties had become impressed with the desirability of employing sampling procedures in such studies. Defendants say that they were satisfied that the studies "covered major gathering areas." Later it turned out that a considerable number of representative shipments embraced in their cost studies had not originated in the previously selected gathering areas, but the defendants point out that, "cars from non-study areas were applied costs based on study areas with like operating conditions * * * on the basis of operating judgment." As usual in such situations, there was much argument on this point which involves the process technically called imputation.

The evidence indicates that study cars originated in the gathering areas incur a greater than average amount of service and handling. The gathering studies are a measurement of the specific services rendered these cars and despite certain weaknesses we believe they more closely approach the actual cost incurred by these cars than the system average costs produced by unadjusted Rail Form A. As previously set forth, the solely related costs were deleted.

(b) *Train crew wages.*—Train crew wages were assigned to through trains, engine district by engine district, on the basis of wage rates applicable over each road participating in the haul. They are not the actual wages paid on a specific train but are an estimate of the wages paid on a typical

through train on each engine district. The midwestern lines state that crew wages are overstated in mountain-Pacific territory because the traffic moves in trains of greater weight than the average train weight used as a divisor of train crew wages.

(c) *Interchange switching.*—The defendants assigned interchange switching cost on the basis of a count of the actual number of interchange handlings. This is a more accurate method than their assignment on an average basis according to distance.

(d) *Special services.*—These include instances in which certain shipments incur handling and expense not usually given to most traffic. The defendants followed the principle, which is correct, of applying appropriate unit costs for the particular service as such services were performed in the movement of the study traffic. These services
49 include the produce terminals in the East, floating in San Francisco, New York, and across Lake Michigan, clerical costs of reconsignments and diversions, weighing, switching for feeding, watering, and resting livestock, platform and switching costs for transloaded cars, switching and terminal costs for cars stopped in transit, and others. Many of these items are relatively not large but they generated a great deal of testimony both pro and con. Their net effect was a small increase in the costs of the East and mountain-Pacific territories relative to the Midwest.

Concerning defendants' refinements to and departures from Rail Form A costs discussed in items (a) through (d) above, and others listed in the paragraph immediately preceding item (a), some are relatively insignificant while others are wholly or partially offsetting. It is our opinion that the adjustment of each and every one of these refinements and departures would, in the final analysis, produce net results of negligible effect. It should be noted, however, that while we considered these items in our analysis but did not adjust them in our restatement, this should not

be construed as meaning either an acceptance or rejection thereof. Rather, based on the cost data of record, it is our opinion that in this proceeding, which involves a large and varied body of traffic, adjustment of every one of defendants' many refinements and departures is neither warranted nor justified. This is substantiated by the following table which shows the percentage point differences between our restated costs and Rail Form A costs; and between revenue as settled and each of the cost showings:

| | Revenue as settled | Restated Defendants' cost study | Rail Form A costs | Differences in percentage points: Revenue over cost — Restated costs | Differences in percentage points: Revenue over cost — Rail Form A | Differences in percentage points: Cost vs. Cost |
|---|---|---|---|---|---|---|
| | (1) | (2) | (3) | Cols. 1-2 (4) | Cols. 1-3 (5) | Cols. 2-3 (6) |
| | *Percent* | *Percent* | *Percent* | | | |
| Official mountain-Pacific traffic: | | | | | | |
| Mtn.-Pac. ..... | 58.7 | 54.1 | 52.9 | +4.6 | +5.8 | +1.2 |
| Midwest ..... | 19.5 | 19.8 | 20.4 | —0.3 | —0.9 | —0.6 |
| Official ..... | 21.8 | 26.1 | 26.7 | —4.3 | —4.9 | —0.6 |
| Midwest-mountain-Pacific traffic: | | | | | | |
| Mtn.-Pac. ..... | 72.9 | 68.5 | 68.3 | +4.4 | +4.6 | +0.2 |
| Midwest ..... | 27.1 | 31.5 | 31.7 | —4.4 | —4.6 | —0.2 |

50 The significance of column (6) is the smallness of the difference between the two cost showings; one, based on a study made in great detail of the particular services rendered this traffic, and the other, a straight Rail Form A application. One substantiates the other, and supports the view that, for a large and varied body of traffic as here at issue, territorial average costs will be the substantial equivalent of specific costs.

The above cost evidence shows that for the official-mountain-Pacific traffic the defendant lines received a share of revenue which was between 4.6 and 5.8 percentage points

more than their share of the cost of furnishing the service, the midwestern lines received from 0.3 to 0.9 percentage points less, and the official lines received from 4.3 to 4.9 percentage points less than their proportion of the cost of furnishing the service. The defendant lines received a division of revenue on the Midwest-mountain-Pacific traffic which was from 4.4 to 4.6 percentage points more than their share of the cost of furnishing the service and the midwestern lines correspondingly less.

Based on the next-preceding table, our restated costs show that the settled revenue of defendants from the traffic to and from official territory was 157 percent of their out-of-pocket costs. The settled revenue by the midwestern lines exceeded their out-of-pocket costs by 43 percent, and the corresponding excess of the complainants was 22 percent. In the case of traffic to and from midwestern territory defendants' revenue was 171 percent of their out-of-pocket costs while midwestern lines revenue was 139 percent of their out-of-pocket costs.

The parties are in disagreement as to the treatment of fully distributed costs as distinguished from out-of-pocket costs in computing relative costs in cases of this character. The complainants and the midwestern roads contend that fully distributed costs, including an apportionment of the constant costs on a ton and ton-mile basis provide a proper measure of relative cost of service. On the other hand, the defendants rely exclusively on out-of-pocket costs for this purpose, contending that constant costs have a bearing on revenue needs and not relative costs. Each group excepted to the recommended report because it did not undertake to settle this controversy.

In *Class Rate Investigation, 1939,* 262 I.C.C. 447, 571, the Commission said:

51 Rail costs are fundamentally divisible into two components. First, those expenses which vary direct-

ly with the traffic handled, and hence are directly assignable to particular kinds of traffic, i.e., the out-of-pocket or variable expenses, and secondly, those expenses of a constant or fixed character, which are not capable of assignment to particular kinds of traffic, and which must be borne by the various kinds of traffic in proportion to the ability of each to pay. The sum of the out-of-pocket costs plus a pro rata distribution of the constant cost is referred to as fully distributed cost.

Necessarily, constant costs are incurred as a result of transportation as a whole without regard to the amount of service performed. Being unrelated to separate units of service, any assignment of them to such units by an averaging process is necessarily arbitrary, and this fact must be kept in mind in considering the weight to be accorded cost studies constructed in this manner. This is not to say that constant costs are to be disregarded or that out-of-pocket costs should be used as the sole basis for judging divisions, but it seems desirable that there should be separate showings of the two classes of costs. For example, out-of-pocket costs may be useful in determining the amount of revenues for each contending group required to avoid confiscation. We agree with the defendants that constant costs are significant in the consideration of revenue need, but we do not agree that section 15(6) of the act, providing that we "shall give due consideration, among other things • • • to the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation" requires any particular treatment of constant costs.

None of the contending groups is urging that divisions to be prescribed should rest solely on ascertained costs of service. Notably the defendants contend that their suggested divisional scale for mountain-Pacific territory before referred to should be increased 35 percent in recognition

of their claimed revenue need. This percentage is said to have been determined by experimentation to provide a basis which would produce an overall increase of 10 percent in their revenue from the divisions in issue, but no details of the process were stated. Their principal cost witness analyzed the problem involved as follows:

> There is necessarily more to divisions than a showing of the comparative costs of the service performed, no matter how effectively this latter task may be performed. Section 15(6) of the Interstate
> 52 Commerce Act refers to the amount of revenues required to pay respective operating expenses, taxes, and fair return, including total carrier financial needs, carrier credit, and the burden of meeting the necessary constant costs, the passenger deficits and return on investment. The composition of each carrier's traffic, the distribution of the burden among all traffic carried, and the financial dependence of the respective carriers upon the traffic in question are vital factors to be weighed. It is plain that no single formula can be used to fix fair divisions under all circumstances.

If on traffic to and from official territory the divisions of the defendants were to be increased 10 percent, as they urge, their percent of revenue over their out-of-pocket costs as shown in our restatement would become 73 percent instead of 75 percent. The midwestern lines' percent of revenues over their out-of-pocket costs would shrink from 43 percent to 23 percent, and that of the complainants from 22 percent to 4 percent. Similarly with respect to traffic to and from the Midwest the defendants' percent of revenue over their out-of-pocket costs would become 89 percent instead of 71 percent, and that of the midwestern lines would be reduced from 39 percent to 1 percent.

It is worthy of note that the defendant's suggested divisional scales said by them to reflect actual costs without consideration of revenue needs applied in the manner which

they outline would increase many of the most important present divisions. The eastern division between Pittsburgh and the Pacific ports via St. Louis, for example, would be increased from 20 to 25 percent. The eastern division between Detroit and the Pacific ports via Chicago would be raised from 13 to 15 percent. Between Chicago and San Francisco via Council Bluffs the midwestern division would be increased from 16.5 to 22 percent. Between St. Louis and Spokane via Council Bluffs the midwestern division, now 12.1 percent, would become 21 percent. Between New Orleans and Los Angeles via El Paso the present midwestern division, 47.4 percent, would be increased to 50 percent. Between Memphis and Phoenix via El Paso the present midwestern division, 51 percent, would be increased to 62 percent.

Even under the proposal of the defendants designed to increase their revenue by 10 percent some of their present divisions would be reduced. On this point they say:

> The increase which we proposed in the divisions of the mountain-Pacific lines was specifically reflected in scales that would produce the proposed result. Application of those scales to the Chicago-Council
> 53 Bluffs haul having a present division of 16.5 percent would produce divisions of 18.6 percent on traffic receiving terminal service in Chicago and 13.6 percent on traffic bridged through Chicago * * *.

### Revenue Needs

The report in *Class Rates, Mountain-Pacific Territory*, 296 I.C.C. 555, contains a detailed discussion of the growth and economic development of that territory and its relation in these respects to other territories. To a considerable extent that discussion was based on evidence presented by the Mountain-Pacific State commissions, which there supported a reduction in the class rates but are here alined with the defendants in urging an increase in their divisions.

Some of that evidence was also incorporated in the present record.

On page 583 of that report is a table showing the increases in population of the Mountain-Pacific States from 1920 to 1952. During that period the total increase for those States was 134.7 percent, compared with 47.4 percent for the United States. The 1960 census figures, which we officially notice, show that from 1920 to 1960 the population of the Mountain-Pacific States increased 205 percent, and that of California more than doubled between 1940 and 1960. In the report last cited the Commission said (Page 583):

> The phenomenal growth of the 11 western States since 1940 is largely due to activities in connection with World War II. The expected postwar decline in population did not materialize for manufacturing, and the demand for consumer goods which expanded under the war economy has continued in an upward trend rather than a downward trend to meet the needs of the postwar economy.

In 1890, when the divisions here under consideration had begun to conform to their present pattern, the population of the Mountain-Pacific States was 3,102 million, 5 percent of the total of the entire country. The present population of the same States, 26.9 million, is 15 percent of the total. The shifts in population and consequent economic changes have also had marked effects on the fortunes of the railroads.

After the end of World War I temporary unsettling influences affected the railroads in 1919-22. Accordingly, the relatively prosperous period from 1923 to 1930, inclusive, before they began to suffer acutely from the depression of the "thirties," affords a fair basis of comparison with the post-World War II period since 1945. The average annual freight traffic of the American railroads, measured by revenue ton-miles, was about 44 percent

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greater in 1946-58 than it was in 1923-30, but the increase was by no means uniform, as shown in the following statement (based upon data of record):

| | Revenue ton-miles | | | |
|---|---|---|---|---|
| | 1923-30 | | 1946-58 | |
| | Annual average (millions) | Percent of total | Annual average (millions) | Percent of total |
| Eastern district ..... | 176,591 | 42.1 | 197,024 | 32.6 |
| Pocahontas region .... | 40,807 | 9.8 | 57,142 | 9.5 |
| Western district ..... | 144,215 | 34.4 | 263,674 | 43.6 |
| Southern region ..... | 57,377 | 13.7 | 86,520 | 14.3 |
| | 418,990 | 100.0 | 604,360 | 100.0 |
| Transcontinental group | 58,553 | 14.0 | 130,889 | 21.7 |

Some features of the foregoing figures should be emphasized, notably the increase of nearly 124 percent for the transcontinental group. The increase for the western district other than that group was 55 percent, somewhat more than the southern increase of 51 percent. The increase for the eastern and Pocahontas lines was only 12 percent and was responsible for the striking decline of their share of the total from 51.9 percent in 1923-30 to 42.1 percent in 1946-58, putting them below the western district.

The following statement is a similar comparison of freight revenue:

| | Freight revenue | | | |
|---|---|---|---|---|
| | 1923-30 | | 1946-58 | |
| | Annual average (thousands) | Percent of total | Annual average (thousands) | Percent of total |
| Eastern district ..... | $1,949,672 | 42.6 | $2,887,164 | 36.0 |
| Pocahontas region .... | 281,911 | 6.2 | 548,222 | 6.8 |
| Western district ..... | 1,718,330 | 37.6 | 3,447,226 | 43.0 |
| Southern region ..... | 621,816 | 13.6 | 1,143,313 | 14.2 |
| | 4,571,729 | 100.0 | 8,025,925 | 100.0 |
| Transcontinental group | 712,896 | 15.6 | 1,730,525 | 21.6 |

The increase in the figure for the transcontinental group was 142 percent, compared with the overall average increase of 76 percent. For the western district other than the transcontinental group, the average increase was 70 percent.

Net railway operating income is compared in the following statement:

55

| | Net railway operating income | | | |
|---|---|---|---|---|
| | 1923-30 | | 1946-58 | |
| | Annual average (thousands) | Percent of total | Annual average (thousands) | Percent of total |
| Eastern district ..... | $446,080 | 41.3 | $268,618 | 29.1 |
| Pocahontas region .... | 86,999 | 8.1 | 99,780 | 10.7 |
| Western district ..... | 405,513 | 37.6 | 403,406 | 43.7 |
| Southern region ..... | 140,332 | 13.0 | 152,354 | 16.5 |
| | 1,078,924 | 100.0 | 924,158 | 100.0 |
| Transcontinental group | 198,966 | 18.4 | 203,160 | 21.9 |

The most significant feature of the latter statement is the reduction of 31 percent for the carriers in official territory, contrasted with the overall reduction of 14 percent.

The three comparative statements last above shown indicate clearly the inferior position of the railroads in official territory as freight carriers, compared with the western district since World War II. In 1923-30, the annual average ton-miles of the official territory lines exceeded those of the western district by 51 percent; in 1946-58 the official average was 4 percent lower than the western. The official lines in 1923-30 had 30 percent more freight revenue than the western district; they had 0.3 percent less in 1946-58. The net railway operating income of the official lines in 1923-30 was 31 percent greater than that of the western district; in 1946-58 it was 9 percent less.

The three statements also show the growing importance of the transcontinental lines. In 1923-30 they accounted for 40.6 percent of the ton-miles of the western district; their percentage in 1946-58 was 49.6. Their freight revenue in 1923-30 was 41.5 percent of the total for the western district; this percentage increased to 50.2 in 1946-58. The transcontinental lines' percentage of the total net railway operating income of the western district, however, increased only from 49 percent in 1923-30 to 50 percent in 1946-58, for reasons discussed infra.

Comparative rates of return on investment represented by the earnings above shown will now be considered. The defendants say that such comparisons should be centered on "1955 and 1956, the most recent years of normal business activity and also for 1957, a year influenced by the recent recession." These years were 3 of the only 4 years between 1946 and 1958 in which the net railway operating income of the eastern roads exceeded that of the roads in the western district, 1953 being the other. Con-
56 sequently, in these 3 years the eastern figure exceeded the western by about 7 percent. The average rate of return for the eastern district and the Pocahontas region in this period was 3.82 percent and for the western district 3.50 percent. In the 13 years, 1946-58, as a whole, eastern net railway operating income was 9 percent lower than the western. (The effect of differing passenger deficits on this comparison will be pointed out later.)

Whether 1955, 1956, and 1957 may be considered "normal" years of business activity is a matter of opinion as to which economists might well differ. They were not representative for comparing earnings of the eastern and western railroads, however, for the reason that the aggregate freight revenue of the railroads in the eastern district and Pocahontas region in those 3 years slightly exceeded that in the western district contrary to the marked trend since 1951.

Until about 16 years ago the usual method of computing rates of return was to divide net railway operating income by investment in railway property as recorded in the carriers' accounts. To compare current rates of return with those for years before 1945 it is still necessary to use this method. In the following statement average rates of return for the principal railroad groups in the period 1946-58 are compared with those in 1923-30, the investment bases being recorded investment in road and equipment, materials and supplies, and cash, less accrued depreciation and amortization:

| | Rates of return on book investment | |
|---|---|---|
| | 1923-30 | 1946-58 |
| | *Percent* | *Percent* |
| Eastern district | 4.97 | 2.81 |
| Pocahontas region | 7.27 | 6.35 |
| Eastern district and Pocahontas region | 5.26 | 3.30 |
| Southern region | 4.63 | 4.47 |
| Western district | 4.23 | 3.68 |
| Transcontinental group | 4.58 | 3.86 |
| Western district, except transcontinental group | 3.94 | 3.50 |
| Midwestern lines (complainants in Sub-No. 1) | — | 3.49 |

In recent years comparisons of this kind have also been based on the elements of value determined by use
57 of the Commission's valuation data. For example, at pages 612-3 of the report in *Class Rates, Mountain-Pacific Territory, supra,* both methods were used in showing the following average rates of return for 1946-54:

*Rates of return*

| | Net investment | ICC valuation—Ex Parte No. 175 |
|---|---|---|
| | *Percent* | *Percent* |
| Eastern district (including Pocahontas regions | 3.31 | 3.46 |
| Western district | 3.83 | 4.38 |

The difference is due principally to the discrepancy between recorded investment and valuation data for the transcontinental lines. The latter, therefore, urge that in comparing rates of return their book figures only should be used, while the complainants and the midwestern lines favor the use of the elements of value. The different results are shown in the following statement:

| | Average rates of return, 1947-58 | |
|---|---|---|
| | Book investment | Elements of value |
| | *Percent* | *Percent* |
| Eastern district | 2.90 | 2.98 |
| Eastern district and Pocahontas region | 3.41 | 3.56 |
| Midwestern lines | 3.54 | 3.69 |
| Transcontinental group | 3.92 | 4.65 |
| Western district | 3.69 | 4.19 |

The disagreement on this point reflects a controversy which has existed for more than 15 years and hinges on the question whether the elements of value or the railroads' book investment figures more nearly show present values of their property for the purpose of administering the Interstate Commerce Act. The matter is considered to be of particular importance by the transcontinental railroads,

whose book-investment figures are farthest out of line with the elements of value. As of 1957, the excess in the recorded investment of the defendants was about 10.4 percent, on the average. For the Southern Pacific, Northern Pacific, and Union Pacific, however, the differences were greater.

58 On behalf of these defendants it is asserted that they were "pioneer railroads," and that their cost of reproduction as found by the Commission's Bureau of Valuation assumed the use of facilities which did not exist at the time of original construction. The evidence offered in support of this view, we believe, is insufficient to disclose infirmities in the valuation process and certainly insufficient to show that the book figures of the defendants are unimpeachable.

The same question was considered in the Commission's report in *New Automobiles in Interstate Commerce,* 259 I.C.C. 475, which the defendants to a considerable extent rely on here. There, our Section of Cost Finding used the elements of value. On page 524 of the report, it was stated that "all railroads declined to accept the rate-making values furnished by the Bureau of Valuation," but the Commission pointed out that "all of the elements of value which the act requires shall be considered were taken into account by the Bureau of Valuation."

In our judgment, controlling weight should be given the showing based on elements of value consistently with the views expressed by the Commission in other divisions cases.[7]

Another contention of the defendants is that "the data of record overstate the true costs and understate the real earnings of the New York Central and the Chicago & North Western because they reflect acknowledged inefficiencies of their prior managements." In 1954 there was

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[7] See appendix A.

a change in the management of the New York Central after a heated and widely publicized proxy fight. About 2 years later, under somewhat different circumstances, the executive control of the North Western also changed hands.

The defendants presented a considerable number of statements in speeches, reports to stockholders, talks to security analysts, press releases, and testimony in administrative proceedings, in which the new executives criticized previously existing conditions on these railroads and commented unfavorably on the managerial capabilities of their predecessors. They therefore urge that "financial comparisons should exclude the temporarily depressed earnings of those two roads." The omission of the New York Central would raise the average rate of return of the eastern railroads in 1946-58, based on book values previously shown in this report as 3.30 percent, to 3.57 percent, and the omission of the North Western similarly would increase the rate of return for the western district from 3.68 percent to 3.80 percent.

59 The Commission is required to give "due consideration, among other things, to the efficiency with which the carriers concerned are operated," but in the nature of things such consideration presents a great difficulty in assigning a definite weight to this element in appraising either cost or revenue need. We discount the importance of the criticism of past managements of the New York Central and the North Western in the evidence before us as proof of past inefficiency.

For a proper comparison of rates of return the defendants would have us find that "consideration of the acquisition adjustment account is necessary to reflect the investment in road and equipment property of the carriers party to this proceeding." They contend that "the disregard of the acquisition account, sought by the midwestern lines, is an effort unlawfully to increase the investment of the reorganized carriers."

Acquisition adjustment is principally the amount of difference between (1) the recorded value of assets acquired, and (2) the par or stated value of capital stock and the face value of securities issued or assumed upon reorganization or merger. Detailed explanation of the nature of adjustment upon reorganization appears in *Chicago G. W. R. Co. Reorganization*, 247 I.C.C. 193 (1941). The reasons for the use of the account are fully stated in that report, and need not be repeated here.

The practical significance of the point raised by the defendants is indicated in the following excerpt from their brief:

> Failure to consider acquisition adjustment reduces the rate of return of the Midwestern roads by about 3/10ths of a percentage point, as compared to about 1/10th of a percentage point for the Mountain-Pacific roads, thereby changing rate of return comparisons by some 2/10ths of a percentage point in the interest of the Midwestern lines in this divisions proceeding. The Midwestern lines' disregard of the acquisition adjustment account is an effort to reverse the Commission and judicial action determining the investment of the reorganized roads and, specifically, to reverse the Commission's 1941 decision [above cited] establishing the investment accounts for reorganized roads.

By section 15(6) of the act, the Commission in prescribing divisions is required to give due consideration, among other things, to the amount of revenue required to pay a "fair return on their railway property held for and used in the service of transportation." The defendants' contention is in substance that the value of such property is net investment therein as shown in the carriers'
60 accounts determined by deduction of the acquisition adjustment in case of reorganized railroads.

There is no support for this contention in the report above cited. At page 196 thereof the Commission said:

> In the accounting classifications which we have prescribed for the carriers subject to our jurisdiction, investment in physical property is not stated on the basis of value but on the basis of cost. The amount shown as such investment in the balance sheet does not purport to reflect the value of the property in either sense above indicated [referring to "value in the strict economic meaning of the word" and "value for rate-making purposes" discussed in the next-preceding paragraph], but only its cost to the accounting carrier.

In our opinion controlling consideration need not be given to the acquisition adjustment in connection with evidence pertaining to the "fair return" mentioned in section 15(6).

It is generally agreed that comparisons of net railway operating income alone are not entirely reliable in judging the significance of rates of return on investment because of certain distortions in the incidence of the Federal income tax. Of principal importance is the fact that that tax applies to nonoperating income, known as "other income," as well as revenue from railway operations. The defendants have larger proportions of other income than the other contending groups. Another complication is due to the availability of income-tax savings from accelerated amortization of cost of defense projects completed before 1956. Federal income taxes were temporarily deferred for 5 years after completion of such projects through higher-than-normal tax credits, and in all probability the tax burden will be increased correspondingly for the remaining life of the property. The western roads principally received defense-project certifications, which thus indirectly

tended to overstate their net income. Adjustments in reported net railway operating income to allow for these distortions can readily be made and are shown in the record. In the following statement average rates of return for 1951-58 based on adjusted and unadjusted net railway operating income applied to book investment bases are shown:

61

| | Average rates of return on book investment | |
|---|---|---|
| | 1951-58 Unadjusted n.r.o.i.[1] | Adjusted n.r.o.i. |
| | *Percent* | *Percent* |
| Eastern district and Pocahontas region | 3.47 | 3.26 |
| Midwestern lines | 3.54 | 3.11 |
| Transcontinental lines | 3.83 | 3.70 |

[1] Net railway operating income.

In comparing net railway operating income and rates of return based thereon, differences with respect to the passenger deficit, which have an important bearing on such comparisons should also be considered.

The record contains statistics for the years 1950-58 showing annual passenger deficits and freight net railway operating income for the larger railroads in all territories. A comparison of the figures for 1950 with those of later years is shown below:

*Passenger deficits (thousands)*

| Year | Principal eastern district and Pocahontas lines | Principal western district lines | Transcontinental lines (AT&SF, D&RGW, GN, NP, SP, UP) |
|---|---|---|---|
| 1950 | $174,708 | $202,881 | $110,977 |
| 1951 | 250,873 | 265,745 | 151,621 |
| 1952 | 230,710 | 257,245 | 146,894 |
| Average, 1950-52 | 218,763 | 241,957 | 136,497 |
| 1953 | 233,129 | 306,205 | 181,202 |
| 1954 | 195,919 | 315,972 | 193,202 |
| 1955 | 202,234 | 292,607 | 172,546 |
| 1956 | 226,233 | 321,461 | 189,944 |
| 1957 | 240,024 | 326,392 | 193,310 |
| 1958 | 179,112 | 290,444 | 170,400 |
| Average, 1950-58 | 214,771 | 286,550 | 167,788 |

Several aspects of this showing should be noted. The principal eastern roads' average for 1950-58 was 1.8 percent below the 1950-52 average deficit, and in 1958 it was 18.1 percent lower than the 1950-52 average. The 9-year average for the principal western district roads was more than 18 percent higher than the 1950-52 average. The unfavorable western showing is accentuated by the inclusion of the transcontinental lines. Their average
62 annual deficit for 1950-58 was 22.9 percent higher than their 1950-52 average, and even after a slight reduction in 1958 it remained 24.8 percent higher. The passenger deficit for the principal western lines in 1958, excluding the transcontinental lines, was only 13.8 percent higher than the 1950-52 average.

The complementary comparison of freight net railway operating income in the next statement is pertinent:

*Net railway operating income—freight service (thousands)*

| Year | Principal eastern district and Pocahontas lines | Principal western district lines | Transcontinental lines |
|---|---|---|---|
| 1950 | $482,865 | $615,329 | $344,495 |
| 1951 | 564,052 | 613,813 | 356,206 |
| 1952 | 592,714 | 650,211 | 360,612 |
| Average, 1950-52 | 546,544 | 626,451 | 353,771 |
| 1953 | 608,648 | 681,766 | 388,312 |
| 1954 | 467,133 | 636,178 | 383,044 |
| 1955 | 583,559 | 671,946 | 404,292 |
| 1956 | 601,151 | 686,165 | 402,826 |
| 1957 | 541,608 | 656,575 | 392,175 |
| 1958 | 364,951 | 632,574 | 378,417 |
| Average, 1950-58 | 534,076 | 649,284 | 378,931 |

The foregoing statement shows that the average for the principal eastern roads in 1950-58 was 2.3 percent less than the 1950-52 average, and their 1958 income was 33.2 percent lower than that for 1950-52. On the other hand, the average for the principal western roads for 1950-58 was 3.6 percent higher than the 1950-52 figure, and 1958 was 1.0 percent higher. In 1950-58 the transcontinental lines had an average annual gain of 7.1 percent over 1950-52, and their percentage gain in 1958 was 7 percent also. Without the transcontinental lines, the principal western district roads in 1958 would have had a 6.8 percent reduction below the 1950-52 average.

In the 9 years from 1950 to 1958 the principal western district railroads had average freight net railway operating income of $649.284 million, which was 21.6 percent greater than the eastern average of $534.076 million. This was a considerably greater spread than that between the average annual net railway operating income of the two

groups from all services in the same period, $319.305 million for the principal eastern lines and $362.734
63 million for the principal western lines, amounting to $43.429 million or 13.6 percent.

The defendants say in their brief:

> The traffic available to support the mountain-Pacific roads is very different from the traffic upon which the midwestern and eastern lines depend for their revenues. The severely depressed rates and unusual character of that traffic pose the greatest threat to the ability of the mountain-Pacific lines to maintain even their present low level of earnings and return to their owners.

Because of "hold downs" affecting their rates which have resulted from the general rate increases since World War II, one of the defendants' witnesses, a Union Pacific executive, testifying in 1956, stated that "rate action which has been designed broadly, and generally on the national basis, to offset increases in costs, has fallen far short of doing so in respect to the principal transcontinental traffic because of its highly competitive character." In the same vein he went on to say:

> just in the degree that the mountain-Pacific roads' reliance on traffic subject to this inherent disability is greater than that of other groups of roads, the persistent decline in our rate of return is more serious than that of other lines * * *. The competitive factors inherent in the traffic we handle operate to impose holddowns in the rate advances required by each round of wage increases. As this pattern is projected into the future * * * the position of the Union Pacific and other mountain-Pacific roads dependent on the long haul holddown traffic will continue to deteriorate relative to the roads relying on other traffic for the greater part of their revenue * * * the public has not been adequately aware of the Union Pacific's extremely un-

favorable position as a railroad. Our eastern and midwestern friends have perhaps been more energetic in advertising their difficulties.

The statistics of record fail to show deterioration of the kind referred to by this witness. It has already been pointed out that the financial position of the mountain-Pacific lines as freight carriers in the postwar period as a whole has been better than that of either the eastern or the other western lines. The trend continued after 1956 when the testimony above quoted was given. The average freight net railway operating income of the transcontinental lines in 1957 and 1958, the latest years covered by the record, was only 4.4 percent less than it was in 1956, and there was substantially no change in the figure for the Union Pacific. On the other hand, the other principal western lines had a reduction of 8 percent, and the average annual
64 freight net railway operating income of the eastern lines in 1957 and 1958 was 25 percent lower than it was in 1956.

The comparisons of freight net railway operating income and passenger deficits also have a bearing on the assertion of the defendants that "the increased investment required in serving the growing mountain-Pacific territory has produced no return for the owners of the mountain-Pacific roads." This alleged deprivation results from passenger deficits of those roads, as will now be explained.

For example, in 1955 the Union Pacific had net railway operating income of $43.7 million and $44.1 million in 1950, a reduction of 1 percent, although its net investment in the same period had increased 21 percent. Its freight net railway operating income, however, increased from $74.8 million in 1950 to $90.3 million in 1955, an increase of 21 percent. For the 8 years 1951-58 its average annual increase in such income was 11 percent over 1950. This increase has not been reflected in net railway operating income from all services, however, for the reason that in

1951-58 the Union Pacific had an average passenger deficit of $45.7 million per year, 51 percent greater than its deficit in 1950.

Similarly, the defendants say that "in the 5-year period 1951-1955 the mountain-Pacific roads found it necessary to increase their net investment in transportation property by $800 million * * * but this increase in investment produced not one penny of earnings." Defendants say further by way of explanation:

> The net railway operating income of the mountain-Pacific rail group since 1950 has never equalled the 1950 figure. In effect, this group of carriers has yet to receive any return on the added $801 million investment in rail plant which it has made since the beginning of 1951.

Between 1951 and 1955, inclusive, the major mountain-Pacific railroads (AT&SF, GN, NP, SP, and UP) increased their net investment by $731 million, and the improved facilities were undoubtedly helpful to them in handling a steadily growing volume of traffic, which measured by revenue ton-miles showed an average annual increase in 1951-58 of 10 percent above 1950 and produced freight net railway operating income on the average 11 percent higher each year in 1951-58 than in 1950. Their decline in net railway operating income from all services after that year reflects the fact that their average annual passenger deficit in 1951-58, $174.9 million, was 58 percent greater than that of 1950.

65 The defendants lay stress on the fact that in 1956 the eastern lines' net railway operating income from all services was 22 percent higher than it was in 1951, while the increase for the mountain-Pacific railroads in the same period was only 4 percent. Here again the differing passenger deficits must be kept in mind. A comparison of freight net railway operating income of the two groups in

1956 and 1951 shows an increase of 6 percent for the eastern lines and 13 percent for the transcontinental lines.

Upon the facts relating to revenue need discussed on preceding pages, it is our conclusion that the eastern railroads are in a less advantageous situation as freight carriers than those in the western district. The most favorable comparison from the standpoint of the western lines, we believe, is the showing that the average return of the eastern district and Pocahontas region in 1946-58, based on net railway operating income from all services adjusted for income tax differences as before explained, related to book investment, was 3.26 percent, compared with 3.34 percent for the midwestern group and 3.89 percent for the transcontinental defendants. If the elements of value are used as the investment base, the percentages become 3.40 for the eastern lines, 3.49 for the midwestern group, and 4.64 for the defendants.

Of greater significance than this comparison of rates of return is the postwar trend of declining freight traffic of the eastern railroads shown on this record. Their average annual ton-miles for the period 1947-58, 253.4 million, were 4 percent lower than the number, 263.6 million in 1946. In only 4 of those years, 1947, 1948, 1951, and 1956, did their traffic measured by revenue ton-miles exceed that of 1946. The railroads in the western district, on the other hand, had an average of 265.3 million ton-miles per year in the same period, compared with 244.2 million in 1946, an increase of 9 percent. In only one year, 1949, did the western district fail to show an increase over 1946. For many years prior to 1949 the western district was below the eastern district and Pocahontas region with respect to total revenue ton-miles, but that year marked a turning point. In the decade 1949-58 the western district has led the East by an average difference of 7 percent. No developments are in sight which point to a reversal of this trend.

We turn now to the assertion of the midwestern lines that their revenue needs "are greater than those of the opposing

eastern and transcontinental roads." They princi-
66 pally rely on statistics for 1957, which they consider "the most accurately representative recent year." In 1957 their net railway operating income, $108.85 million, was the lowest of any year since 1946, and was 17 percent lower than the average of $130.6 million for 1946-58. This 1957 figure was lower by $101 million than the net railway operating income of transcontinental roads and lower by $276 million than that of the official lines. The respective average differences in the 13-year period were $78.7 million and $230 million. With adjustment for differences in income tax before described, the midwestern lines show that their rate of return on elements of value in 1957 was 2.56 percent, compared with 3.17 percent for the official lines and 3.53 percent for the transcontinental group. The average rate of return for the midwestern lines in 1946-58 was 3.49 percent.

The following statement shows net railway operating income from freight service and passenger deficits of the principal midwestern lines (IC, GM&O, C&NW, CRI&P, MKT, MoPac, StL-SF, CB&Q, and CMStP&P) for the years indicated:

| Year | Freight net railway operating income (000) | Passenger deficit (000) |
|---|---|---|
| 1950 | $289,037 | $ 96,926 |
| 1951 | 274,964 | 121,047 |
| 1952 | 297,479 | 116,126 |
| Average, 1950-52 | 287,160 | 111,366 |
| 1953 | 304,298 | 130,797 |
| 1954 | 275,569 | 130,938 |
| 1955 | 286,316 | 125,264 |
| 1956 | 302,428 | 143,851 |
| 1957 | 280,223 | 147,797 |
| 1958 | 276,789 | 134,823 |
| Average, 1950-58 | 287,456 | 127,507 |

The comparatively stable freight income of the midwestern lines indicated in this table reflects the fact that they were not affected by the adverse influences which reduced the income of the eastern lines after 1952, nor by the conditions which increased the freight earnings of the transcontinental carriers in the same period. The increase in their passenger deficit, which was less than that of the transcontinental lines, also has a bearing on comparisons of net railway operating income from all services. The midwestern lines shared in the postwar expansion of railroad freight traffic in the western district before pointed out. In only 3 years of the 1946-58 period, namely,
67 1949, 1954, and 1958, did their ton-miles fall short of the number in 1946. Their overall average increase has been about 3 percent, compared with 13 percent for the transcontinental lines, 5 percent for the western district other than the latter lines, and a decline of 4 percent for the eastern district and Pocahontas region.

Upon all the evidence relating to revenue need, it is our view that the midwestern lines rank below the transcontinental roads in earning power as judged by statistics for the postwar period and that their prospects for sustained or increased freight income are less promising than those of the defendant transcontinental railroads. At the same time, as a group, they are shown to be in a considerably more favorable condition than the eastern railroads. That view is counter to the objective of the midwestern lines stated in their brief, as follows:

> The revenue effect of the proposal of the midwestern complainants, based on their one percent traffic study for 1953-1955, would be increases in revenue of 23.62 percent for the Midwestern lines and 4.78 percent for the Eastern lines, and reduction in revenue of 9.19 percent for the Transcontinental lines and 1.67 percent for the Southern lines. * * * the revenue results would be increases of approximately $38 million per year for

the Midwestern lines and $4 million per year for the Eastern lines, and reductions of approximately $42 million per year for the Transcontinental lines and $3,300 for the Southern lines.

CONCLUSIONS

The last sentence of section 15(6), which has been quoted in part supra, is as follows:

> In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

Commenting on this provision in its recent decision in *Boston & Maine R.* v. *United States,* 208 F. Supp. 661, affirmed 371 U.S. 26, the district court (Massachusetts) said:

68 "Due consideration" is not the equivalent of "primary consideration." The importance to be given any of the factors enumerated in the statute must necessarily depend upon the case under consideration. The evaluation of the importance of the various factors in any given case is peculiarly the function of the Commission.

*Efficiency.*—The complainants in their requests for findings say that "the record indicates that the contending groups of carriers are efficiently operated, and that eastern lines are second to none in this respect." The claim of the midwestern lines is that they "are as efficiently operated as the other carriers involved, and there are no significant differences in efficiency of operations among the actively contending groups." The defendants do not charge that either of the other two groups is inefficient, but, as stated earlier in this report, they criticize operating practices and facilities of the New York Central and the Chicago & North Western in past years, particularly in 1956, as wasteful and inefficient, and request the following finding:

> Cost comparisons between railroad groups based on the data of record should take account of the overstatement of costs of the [New York] Central and the Chicago & North Western now in the process of correction, and financial comparisons should exclude the temporarily depressed earnings of those two roads.

The effect of excluding these two carriers from comparisons of rates of return, which we do not regard as vitally important, was pointed out earlier in this report. Data of record fail to show how cost comparisons would be affected by such exclusion.

In our opinion the record shows that none of the contending groups is more or less efficiently operated than another.

*Public importance.*—On this point the complainants request the following finding:

> The transportation services of the contending groups of carriers are important to the public. The services of eastern lines in reaching and serving the populous market areas consuming transcontinental products and in originating the more compensatory westbound traffic provide an indispensable link in the chain of service

essential to eastern and western shippers and receivers alike.

Similarly, the midwestern lines assert that they "are an important part of the national transportation system" and that "there is no real issue in these proceedings with respect to the relative importance to the public of the transportation services of any of the contending carriers."

69 The following requested finding of the defendants is pertinent here:

> In view of the public interest in maintaining and developing railroad transportation in the rapidly growing mountain-Pacific territory and the primary dependence of the roads serving that territory upon the transcontinental divisions for their revenues, the transcontinental divisions of the mountain-Pacific roads should be increased.

The defendants say further that "a way must be found to increase the earnings of the mountain-Pacific roads in order that their ability to meet the investment demands of the territory served not be impaired," that "railroads in all territories rely on railroad earnings as a primary source of funds for investment in railroad plants," and that it would be "an unwise reversal of regulatory policy to base any decision on the premise that the mountain-Pacific lines should not rely upon retained earnings for investment needs but should further add to their debt."

The intervening State commissions emphasize the importance of railroad transportation to the economy of mountain-Pacific territory in supporting the defendants' contention that their divisions should be increased. Evidence was presented by the interveners (other than the California Public Utilities Commission) relating principally to agricultural and industrial production in Washington, Oregon, and other northwestern States, from which there

is an important eastward rail movement of forest products, deciduous fruits, canned and frozen fruits and vegetables, and mineral products. These commodities have been accorded competitive rates reflecting holddowns, and the interveners predict that fnrther reductions in such rates will be necessary. In order to permit the mountain-Pacific railroads to increase their capital expenditures for the purpose of providing adequate transportation of the commodities before referred to, these interveners join in urging that the present transcontinental divisions of the mountain-Pacific lines should be increased.

Similarly, the California commission calls attention to—

> the continuing rapid growth of California and the ever-increasing importance of rail transportation to the State, distant as it is from eastern markets; the needs of this State to be served by railroads having adequate earnings and sufficient financial strength to make investment in improvements, including purchase of cars, locomotives and other equipment, of sufficient magnitude to serve the transportation needs of California; the adverse consequences to the people and the economy of this State if the railroads terminating in California should be deprived of current earnings which are the means of meeting such transportation needs; the importance to the California public and, especially to its lumber shippers and farmers of having products to compete in such markets, having been accomplished in the past by the application of so-called holddowns in general rate increase cases.

As estimated by the defendants, "the average hauls on transcontinental traffic are over 1,200 miles in the mountain-Pacific territory, approximately 1,000 miles in the midwest, and 630 miles in official territory." Since about 58 percent of the total service measured by miles is rendered in the two territories last named, the railroads per-

forming that service also have an important part in transcontinental transportation. In our opinion there are no differences in the importance to the public attributable to the three contending groups of carriers.

*Required revenue.*—Since the greater part of the record consists of evidence offered for the purpose of supporting the conflicting contentions that each of the three principal groups requires far more revenue from the traffic involved than it now receives, their numerous requests for findings necessarily reflected those contentions, and the same is true of their exceptions to the recommended report, the conclusions in which fell short of complete acceptance of the views urged by any one of the contending groups.

From our consideration of the cost evidence previously discussed in this report we are convinced that the present divisions are favorable to the defendants to an extent not justified by ascertainable cost differences. The evidence, however, does not provide an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue need. This was recognized in the recent decision in *Boston & Maine R.* v. *United States, supra,* at page 675, where the court said:

> The question of divisions involves the making of practical judgments and cannot be solved "as though it were a mathematical problem to which there could only be one correct answer." *Interstate Commerce Commission* v. *Union Pacific R. R.,* (1912), 222 U.S. 541, 550.

The positions taken by the contending parties here afford support for the foregoing observation, for as before stated, their proposals reflect their views on revenue need to an equal if not a greater extent than on strict cost. Nothing in the nature of a mathematical formula to measure such need exists.

To increase the defendants' divisions by an average of 10 percent in recognition of claimed revenue need
71 would have the effect of requiring the eastern and the midwestern railroads to absorb the greater part of the reductions in the interterritorial class rates to and from mountain-Pacific territory approved by the Commission in 1955, based principally on improved economic and transportation conditions in that territory.

We are unable to agree with the defendants and the interveners that the public interest warrants increased in the divisions of the mountain-Pacific railroads in order to provide a source of investment funds required for enlarged facilities commensurate with industrial development in that region. The railroads in all sections of the country are faced with the continuing necessity of raising funds for additions and betterments and new equipment, and we cannot recognize any difference in the degree of this urgency among the territorial groups.

Admittedly, for geographical reasons the defendants must look to the transcontinental traffic for a larger proportion of their total freight revenues than the other two groups, but the large volume which has been handled under substantially improved transportation and operating conditions, as noted in *Class Rates, Mountain-Pacific Territory, supra* (page 655), "within the last 20 years," has been responsible for their growing freight earnings mentioned earlier in this report. It is apparent that all railroads are now and in the future will be dependent on long-haul freight traffic to a greater extent than they have been in the past. This is particularly true of the eastern lines.

From 1947 to 1958 the intraterritorial carload traffic of the railroads in official territory declined 36 percent, and the reduction in their interterritorial traffic in the same period was only 18 percent. In 1958 the latter traffic was 23 percent of the total, compared with 19 percent in 1947. It thus appears that the eastern roads no longer have avail-

able to them the profitable volume of freight originating within their own territorial borders which in past years caused them to be generally regarded as the strongest group of all American railroads. For this reason and others the transportation and economic conditions affecting the eastern and western railroads are far different from those which prevailed 75 years ago when this divisional structure was taking shape. Under the requirement of the public interest that all essential parts of the transportation system be maintained, so far as possible, in effective working condition (*New England Divisions, supra*), we believe that there should be increases in the complainants' divisions reflecting revenue need as well as cost.

72 As between the defendants and the other western railroads the differences in earning power are less marked, but our consideration of the evidence bearing on cost of service previously discussed convinces us that the primary midwestern divisions as a whole are too low. This is particularly true of the divisions of rates to and from Chicago, St. Louis, Memphis, and New Orleans before referred to. In Sub-No. 1 principal but not exclusive attention was centered on the divisions of rates to and from midwest-east territory. These were the subject of the Commission's decision in 1934, which the defendants interpret as an affirmative approval of the then-existing divisions and consider to be of controlling importance here. The question of interpretation is of little moment, however, in view of changes which have occurred in the intervening years.

In the 1934 report the Commission emphasized the fact that "the transcontinental traffic is unevenly balanced as to direction," pointing out that "eastbound it is in general more than 3.5 times as heavy as westbound." (page 320) The 1953 traffic tests of the defendants show a movement of 993,141 cars eastbound and 664,035 cars westbound, the former figure being less than 1.5 times the latter. In the

1934 report the Commission stated that about 60 percent of all transcontinental traffic and about 70 percent of the eastbound perishable movement was overhead traffic to or from points east of Illinois. In 1953 the traffic between mountain-Pacific and official territory was 52 percent of the total and the perishable percentage was 66. The notable improvement in conditions affecting the transcontinental railroads previously described in this report has taken place since 1934. It is also a circumstance not without significance that never before in the litigation relating to the divisions east of the Missouri River gateways have the midwestern lines apparently felt free to join in a united effort to obtain higher divisions for their service in this territory.

*Interterritorial divisions.*—Throughout these proceedings the parties have considered it likely that any prescribed readjustments would be based on the use of divisional scales, popularly known as integer scales, which have been employed in some other decisions dealing with interterritorial divisions in the past 30 years. Although the complainants proposed no specific scheme of divisional factors, they express a preference for some form of scales on the ground that "this method permits definiteness of prescription and consequent earlier effectiveness of the Commission's requirements."

73 The midwestern lines presented a detailed plan for future divisions embodying scales based upon the so-called 28277 scale prescribed in *Official Western Trunk Line Divisions*, 269 I.C.C. 765. In addition to the fact previously mentioned that their plan would give them a share of revenue which we consider much too large in the light of the evidence relating to costs and revenue needs the plan is deemed technically unsound particularly as a basis for interterritorial divisions for reasons stated below.

The 28277 scale applies only to the territory east of the Rocky Mountains both under the decision last above cited

and the later decision in *Akron, C. & Y. R. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 316 I.C.C. 351. In that territory the class rates are on the so-called 28300 basis. The transcontinental class and commodity rates, applying over maximum distances between the East and West, however, are broadly grouped in both territories. We therefore see no practical reason for divisions reflecting 50-mile blocks for interterritorial application, which might prove to be inconsistent with the rate grouping. Accordingly we agree on this point with the defendants, who are opposed to the use of divisional scales for a number of reasons, and say "that the present group basis of publishing transcontinental divisions is highly desirable in the light of competitive conditions affecting the routing of transcontinental traffic."

In appendix B, therefore, we have provided specific primary divisions for application east and west of the principal interchange points between defined groups in eastern and transcontinental territory. The eastern divisions there shown are higher than the present percentages in recognition of the evidence relating to cost and revenue need previously discussed herein.

In this regard, for example, the Seaboard-New England and the Pittsburgh groups and the Pacific coast and Spokane-Reno groups via Chicago are representative. The present division from the Seaboard-New England group to the Pacific coast group is 27.5 percent and the new division is 34 percent, which represents an increase of 24 percent; from the Pittsburgh group to the Pacific coast group the present division is 16.5 percent and the new division is 22 percent, representing an increase of 33 percent. From the Seaboard-New England to the Spokane-Reno group the present division is 27.5 percent and the new division is 38 percent, amounting to a 38-percent increase, whereas from Pittsburgh to the Spokane-Reno group the present division is 16.5 percent and the new division is 24 percent, which is approximately a 45-percent increase.

74 It is our best judgment that the eastern carriers' divisions between the above-named groups should be increased as shown, based on the evidence herein relating to cost and revenue need. The increases in the eastern divisions to and from the interior western groups are necessarily greater than those to and from the Pacific ports as our findings provide for three groups in transcontinental territory in substitution for the single group in effect today.

In *Class Rates, Mountain-Pacific Territory, supra;* the railroads proposed to establish a parity of rates between groups east of the Mississippi River and north and south Pacific coast terminals, and rates to and from the Spokane, Reno, Las Vegas group lower than those to the Pacific coast group. We approved both proposals. The grouping provided in appendix B follows the same general plan, which from the standpoint of cost of service, is preferable to the blanketing of transcontinental territory previously discussed in this report.

Our findings provide for general use of the existing eastern groups. The complainants propose and important departure; namely, the establishment of a new group embracing New England, separate from the present Seaboard-New England group. This action would be inconsistent with the grouping used for the transcontinental class rates, and upon the facts before us we would not be justified in requiring it. The complainants also propose the transfer of Richmond and Norfolk, Va., from the interior eastern to the seaboard group, as well as certain other changes of a minor nature. These changes appear to be desirable and should be capable of adjustment by voluntary negotiation. We agree with the complainants that there is no good reason for continuing the small Bessemer, Pa., group separately from Pittsburgh.

Our findings provide for a defined group of Illinois points principally served by eastern and southern railroads, as well as some western lines, and including also Evansville,

Vincennes, and Terre Haute, Ind., which are on or near the Illinois-Indiana boundary. (The complainants would prefer the exclusion of the Indiana points.) The defendants strongly object to the proposal in the recommended report of a uniform minimum division of 15 percent for the terminal lines serving the proposed southeastern Illinois group in lieu of present divisions said to range from 6 to 12 percent. Both in many divisional bases voluntary established in the past and as well in our decisions it has been common practice to accord minimum divisions for carriers having relatively short hauls, sometimes as high as 20 or 25 percent but more usually 15 percent. The increasingly burdensome terminal costs in recent years are persuasive that a 15-percent minimum is justified.

75

*Interchange points.*—Differences of opinion concerning interchange or dividing points are slight. Since the great majority of the traffic to and from the East moves through Chicago, Peoria, or St. Louis, it is generally agreed that those cities should be the principal dividing points. In addition, we have provided for the use of Mackinaw City, Mich., and for Kewaunee, Wis., the latter being representative for cross-lake routes.

There are a number of interchange points in Illinois which are now grouped with Chicago, Peoria, or East St. Louis, as the case may be. No dissatisfaction with that grouping has been expressed, and it may properly be observed in the application of divisions over the three major dividing points. Certain Mississippi River crossings north of St. Louis where no interchange takes place also serve as dividing points at present, notably East Louisiana and East Hannibal, Ill. At the hearings the complainants proposed that Kansas City or Omaha be primary interterritorial dividing points on traffic interchanged there between the Wabash and western lines. That proposal was disapproved in the recommended report and has been abandoned by the complainants, which now ask that East Hannibal

continue to be used as a dividing point, and there is no objection to such use. Nor is there opposition to the further suggestion of the complainants that East Louisiana be eliminated. Cairo and Thebes, Ill., which are Mississippi River crossings south of East St. Louis, may properly be on the St. Louis basis of divisions.

A minor problem is presented by traffic which moves through two primary major dividing points. On shipments through both Chicago or Peoria and St. Louis it is agreed that the last-named point should be the primary dividing point. Where shipments move through both Chicago and Peoria, however, the midwestern lines and the complainants are in disagreement. We see no good reason for differentiating between Peoria and St. Louis in this respect.

Traffic which is interchanged between eastern and western railroads at St. Louis or East St. Louis generally requires the service of an intermediate terminal rail or motor carrier for the river crossing. At present the cost of that service on transcontinental traffic is borne by
76 the western lines on both eastbound and westbound shipments. The same arrangement formerly prevailed on all interterritorial traffic at St. Louis, but as result of the decisions of the Commission relating to divisions of rates between official territory, on the one hand, and southwestern and western trunkline territories, on the other hand, the eastern lines pay intermediate charges on westbound shipments to those territories and the western lines pay them on eastbound freight. It is generally agreed by the parties that this arrangement should be extended to transcontinental shipments.

Although the complaint in No. 31503 covered divisions of rates to and from intermountain territory, which includes the eastern portion of mountain-Pacific territory not embraced in transcontinental territory, there is no evidence relating specifically to the intermountain divisions other than those of rates to and from Montana, which are

in issue in Sub-No. 1. Also there is no evidence bearing on the divisions between the East and the West over routes through southern territory. Accordingly we shall exclude from our findings the divisions of intermountain rates, except those to and from Montana, and those on traffic which moves through southern territory. It should be possible for the interested carriers to agree upon such modifications of these divisions as may seem necessary in the light of the findings herein.

*Intraterritorial divisions.*—Although broad groups are now employed in connection with the divisions of rates between midwestern and transcontinental territories, they are less well defined than those on which the interterritorial divisions are based, and in a number of instances they appear not to be properly related to distance. The midwestern lines urge that in lieu of prescribing new intraterritorial divisions on a group basis we should formulate scales of divisional factors and authorize the two groups of carriers to apply these to groups agreed upon by them. The defendants apparently are not opposed to that course. In our opinion divisional scales afford an appropriate means of readjusting the intraterritorial divisions, and the possibility of such use was discussed extensively in the record.

A witness for the defendants presented such a scheme, embracing scales said to reflect costs computed in their cost studies, the scale for the defendants being on the average 27 percent higher than that proposed for midwestern territory. The defendants say that these scales "provide a basis scale to which such adjustment can be made to produce the desired distribution of rev-
77 enues." (As before stated, the defendants propose such an adjustment devised to increase their revenue from intraterritorial divisions by about 5 percent.) Having found that the defendants' cost studies understate the costs of the midwestern lines for reasons before pointed out, we could not properly approve the use of these scales.

Another suggestion by the same witness, not advanced as a proposal, was based on use of the so-called 29886 scale of divisional factors prescribed in *Official-Southwestern Divisions*, 287 I.C.C. 553, for movements in midwestern territory, and a scale similarly constructed from the intraterritorial class-rate scale prescribed in *Class Rates, Mountain-Pacific Territory, supra,* (appendix 3) commonly referred to as the 30416 scale, for application within that territory. The suggested scale for the latter territory on the average is 22 percent higher than the 29886 scale. These scales would afford the midwestern lines less revenue than they now receive according to the defendants' showing and less than they would receive by use of the cost scales discussed in the next-preceding paragraph.

Consistency with our action in prescribing intraterritorial class rates for mountain-Pacific territory higher than those in the rest of the country based on the so-called 28300 scale makes it logical to provide a higher scale of divisional factors for that territory here, but a difference of more than 10 percent would not be justified in our opinion. The scales shown in appendix C reflect that difference. They would produce moderate increases in some of the most important midwestern divisions.

*Transit and reconsignment.*—The midwestern lines ask that certain traffic subject to transit arrangements and reconsignment involving unusual out-of-line or backhaul service be excepted from application of the divisions prescribed in this report. There are now special divisions covering this traffic which have resulted from agreements between midwestern and transcontinental lines. Although some of the traffic moves to or from eastern territory, the proportions of the eastern railroads are not affected by these special divisions.

As an illustration of this traffic, the midwestern lines cite a transit movement of barley from the Twin Cities to Chicago and malt from that point through Council Bluffs to the

Pacific coast. They assert that any general basis of divisions would be inappropriate for such traffic, and that any revision of the special divisions thereon "that might be called for in light of the divisions prescribed on the general body of traffic could probably be worked out by negotiations between the interested carriers."

78 The proposed exception is opposed by the defendants, which charge that these special divisions constitute "an unusually preferential divisions arrangement." There is no evidence to support this contention. In our judgment it is proper to except the special divisions from the general bases herein prescribed.

FINDINGS

1. We find that the present divisions of joint rates applicable to the transportation of property between points in eastern or official territory and points in transcontinental territory (including Montana) as between the complainants in No. 31503 (including the Missouri-Illinois Railroad Company) and in No. 31503 (Sub-Nos. 4 and 5), on the one hand, and the defendants in the said complaints, cross-complainants therein, and the complainants in No. 31503 (Sub-No. 1), on the other hand, are unjust, unreasonable, and inequitable.

2. We find that just, reasonable, and equitable divisions in lieu of those referred to in finding 1 would be those set forth in appendix B hereto.

3. We find that the present divisions of joint rates applicable to the transportation of property between points in midwestern territory, as herein defined, and points in transcontinental territory (including Montana), as herein defined, as between the complainants in No. 31503 (Sub-Nos. 1, 2, and 3) and the defendants and cross-complainants in the said complaints, are unjust, unreasonable, and inequitable.

4. We find that just, reasonable, and equitable divisions in lieu of those referred to in finding 3 would be those set forth in appendix C hereto.

The hearing examiners' rulings on evidence are affirmed, for reasons stated in the recommended report.

An appropriate order will be entered.

COMMISSIONER BUSH, concurring in part:

I concur in the finding that the existing divisions assailed in these complaints are unjust, unreasonable, and inequitable, although the divisions prescribed for the future are more favorable to the complainants than I would be inclined to prescribe in the exercise of my own individual judgment.

The discussion of the cost evidence in the report, I believe, satisfies the requirement of section 15(6) that there be due consideration of "the amount of revenue required to pay their respective operating expenses, taxes,
79 and a fair return on their railway property." In addition, consideration was given to relative financial needs, which, as the courts have consistently recognized, is a pertinent factor, *New England Divisions Case*, 261 U.S. 184, 191; *United States* v. *Abilene & S. Ry. Co.*, 265 U.S. 274, 284; *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 360. In the decision last cited it was expressly pointed out that we are not limited to consideration of the return to services covered by the divisions under consideration but may take into account returns from all service.

It is clear that there have been changes in conditions affecting transportation in mountain-Pacific territory which have been advantageous to the railroads in that territory. There were found to justify reductions in the class rates to, from, and within that territory, *Class Rates, Mountain-Pacific Territory*, 296 I.C.C. 555, 655. As recognized by the Supreme Court such changes may be considered in passing upon divisions as well as rates, *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U.S. 74, 88.

The objective in cases of this kind is not to equalize fortunes but to assure a national transportation system sound and healthy in all its parts. Herein, to my way of thinking, lies the public interest responsibility of the Commission in a difficult decision.

COMMISSIONER HUTCHINSON, dissenting in part:

While I agree with the majority that present divisions are unjust and unreasonable and that adjustment is warranted, I am not convinced the record justifies the prescription of divisions at the levels fixed by the report.

The majority seems to emphasize the revenue needs of the eastern roads without giving adequate consideration to the impact of the adjustment on the revenues of the transcontinental lines which originate the preponderance of the traffic and depend upon revenue from interterritorial traffic to a far greater extent than do eastern and midwestern carriers.

Although the report is silent as to the actual amount of revenue the prescribed divisions would shift from the transcontinental lines to eastern and midwestern carriers, estimates indicate the figure would exceed $50 million annually. The record does not warrant so substantial a shift of revenues between the contending carrier groups.

Accordingly, I do not believe the best interests of the public or the carriers, as a whole, will be served by the prescribed divisions.

COMMISSIONER FREAS, dissenting:

80 While it is true that the prescription of divisions involves the exercise of judgment, there must nevertheless be a clear enunciation of the reasons, with appropriate reference to the facts relied upon, for the conclusions reached. Section 8(b), Administrative Procedure Act. Here the gap between the evidence and the ultimate findings is not bridged. See *Stanislaus County* v. *United States,* 193 F. Supp. 145 (N.D. Calif. 1960). Although

some adjustment may be warranted—certainly as to traffic to and from such points as Spokane, Reno, and Phoenix—the substantial changes prescribed by the majority are, in my opinion, not supportable.

The majority finds that none of the contending groups of carriers have been operated either more or less efficiently than another; yet the record contains substantial criticism of the past managements of two carriers which does not seem to have been given effect. It is also concluded that there are no differences in importance to the public of the services of the three groups of carriers. If, as it seems to me this report indicates, the controlling criterion is the revenue needs of the carriers based largely on costs, the record, in my opinion, is fatally defective.

The defendants submitted special studies concerning the handling of the particular traffic involved and have made various adjustments in their overall costs more precisely to reflect the aspects of the transportation, whereas the complainants have generally relied upon nothing more than overall territorial average costs. Considering especially the relationship of the total volume of traffic handled by the respective groups of carriers to the interterritorial traffic at issue, it was incumbent upon the complainants, who must sustain their burden of proof in order to get any relief, to present more meaningful and accurate data regarding the involved freight.

To the extent that costs are a consideration I deem it entirely proper to give effect to differences resulting from such basic factors as grades, curvatures, tunnels, and bridges. However, excepting possibly in situations not here present, I consider it improper to equalize the different fortunes of groups of carriers which are the result of economic conditions prevailing in the various localities. This is so whether done indirectly through the application of territorial average costs, or directly through a showing of density and flow of traffic or of net railway operating

income produced from overall operations in a cer-
81 tain area. With equalization as the objective there will be little point or incentive for either investor or management to seek out and invest money or expend effort in the more promising carriers.

COMMISSIONER GOFF, dissenting:

A glance at a relief map will disclose the series of mountain ranges, over and through which the mountain-Pacific lines must perform gathering or distribution service and line hauls. Insufficient consideration has been given to their relatively higher efficiency, to the importance to the public of their transportation services, and to the fact they are predominantly the originators of traffic. With all respect to my associates, primary consideration of revenue need seems here to have unduly swayed better judgment in arriving at the new scale of divisions.

I would retain the present basis as more equitable than the, to me, confiscatory extremes prescribed.

## APPENDIX A

*Notes*

2. Individual carriers will sometimes be referred to by their initials or other abbreviations.

3. Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

4. The exceptions are as follows: Wyoming—stations on and east of the line of the UP, Laramie and east; Colorado —stations on and east of the line of the C&S between Cheyenne, Wyo., and Trinidad, Colo.; New Mexico—stations on the line of the Texas-New Mexico Railway Company.

5. The term "transcontinental territory" as used in this complaint embraces all of Arizona, California, Oregon, and

Washington, substantially all of Nevada, and the western portions of Idaho, Utah, and New Mexico. "Midwestern territory" includes all of western territory east of the Rocky Mountains except Montana, Wyoming, North Dakota, and northern Minnesota. Sub-No. 1, however, covers divisions of interterritorial and intraterritorial joint rates to and from Montana points over routes via northern lines.

6. The oldest method of dividing joint rates disclosed by railroad history is the mileage prorate or some modification thereof. In 1893 a spokesman for the transcontinental lines in a controversy over divisions referred to the time-honored character of such a basis in the following words:

"The question which we are now called to consider has been brought up repeatedly within the last 20 years. It has been often discussed and as often settled on the present basis. * * * We contend that a basis of divisions which has stood the test of time since the first overland roads were completed—now nearly a quarter of a century—must have been founded on correct principles; principles which govern divisions of revenue on through traffic not only
82 throughout the United States, but the world over. I need not go outside this meeting to find ample proof of what I say, namely, that the principles which govern our present basis of divisions apply generally on through traffic."

7. *Southwestern—Official Divisions,* 234 I.C.C. 135, 147; *Official—Southwestern Divisions,* 287 I.C.C. 553, 564.

## APPENDIX B

*Primary divisions prescribed between complainants and defendants in No.* 31503 *and Sub-Nos.* 4 *and* 5

Territorial groups in eastern territory hereinafter referred to are as follows: E-1, points heretofore embraced in the seaboard-New England group also known as groups A and B; E-2, points heretofore embraced in the interior trunkline or Syracuse group also known as group C; E-3,

points heretofore embraced in the Buffalo-Pittsburgh-Bessemer groups also known as groups D and E; E-4, points heretofore embraced in the Detroit-Indianapolis-Cincinnati groups, also known as group F (except Evansville, Vincennes, and Terre Haute, Ind.); E-5, points on southern, western, or eastern railroads in Illinois south and east of the line of the Atchison, Topeka & Santa Fe between Chicago and Peoria and the line of the Gulf, Mobile & Ohio between Peoria and East St. Louis, and also Evansville, Vincennes, and Terre Haute, Ind.

Territorial groups in western territory hereinafter referred to are as follows: W-1, points in California, Oregon, and Washington (except Spokane); W-2, Spokane, points in Nevada, and points in Idaho embraced in transcontinental territory; W-3, points in Arizona and points in New Mexico embraced in transcontinental territory; W-4, points in Montana west of and including Havre, Great Falls, Helena, and Butte; W-5, points in Montana other than those in W-4.

SECTION I

| Between— | Interchange points | Percentages East | Percentages West |
|---|---|---|---|
| 1. E-1 and W-1 | Chicago | 34 | 66 |
| | Peoria | 36 | 64 |
| | St. Louis | 37 | 63 |
| 2. E-1 and W-1 (except California) | Mackinaw City or Kewaunee. | 34 | 66 |
| 3. E-1 and W-2 | Chicago | 38 | 62 |
| | Peoria | 39 | 61 |
| | St. Louis | 40 | 60 |
| 4. E-1 and W-2 (Spokane only) | Mackinaw City or Kewaunee. | 38 | 62 |
| 5. E-1 and W-3 | Chicago | 37 | 63 |
| | Peoria | 41 | 59 |
| | St. Louis | 42 | 58 |
| 6. E-1 and W-4 | Chicago, Mackinaw City, or Kewaunee | 40 | 60 |
| | Peoria | 42 | 58 |
| | St. Louis | 41 | 59 |
| 7. E-1 and W-5 | Chicago, Mackinaw City, or Kewaunee | 44 | 56 |
| | Peoria | 46 | 54 |
| | St. Louis | 45 | 55 |

## SECTION II

| Between— | Interchange points | Percentages East | Percentages West |
|---|---|---|---|
| 1. E-2 and W-1 | Chicago | 28 | 72 |
| | Peoria | 30 | 70 |
| | St. Louis | 31 | 69 |
| 2. E-2 and W-1 (except California) | Mackinaw City or Kewaunee. | 28 | 72 |
| 3. E-2 and W-2 | Chicago | 31 | 69 |
| | Peoria | 33 | 67 |
| | St. Louis | 34 | 66 |
| 4. E-2 and W-2 (Spokane only) | Mackinaw City or Kewaunee. | 31 | 69 |
| 5. E-2 and W-3 | Chicago | 32 | 68 |
| | Peoria | 36 | 64 |
| | St. Louis | 37 | 63 |
| 6. E-2 and W-4 | Chicago, Mackinaw City, or Kewaunee | 34 | 66 |
| | Peoria or St. Louis | 37 | 63 |
| 7. E-2 and W-5 | Chicago, Mackinaw City, or Kewaunee | 39 | 61 |
| | Peoria | 42 | 58 |
| | St. Louis | 42 | 58 |

## SECTION III

| Between— | Interchange points | Percentages East | Percentages West |
|---|---|---|---|
| 1. E-3 and W-1 | Chicago | 22 | 78 |
| | Peoria | 24 | 76 |
| | St. Louis | 25 | 75 |
| 2. E-3 and W-1 (except California) | Mackinaw City or Kewaunee. | 22 | 78 |
| 3. E-3 and W-2 | Chicago | 24 | 76 |
| | Peoria | 26 | 74 |
| | St. Louis | 27 | 73 |
| 4. E-3 and W-2 (Spokane only) | Mackinaw City or Kewaunee. | 24 | 76 |
| 5. E-3 and W-3 | Chicago | 24 | 76 |
| | Peoria | 29 | 71 |
| | St. Louis | 32 | 68 |
| 6. E-3 and W-4 | Chicago, Mackinaw City, or Kewaunee | 28 | 72 |
| | Peoria | 31 | 69 |
| | St. Louis | 31 | 69 |
| 7. E-3 and W-5 | Chicago, Mackinaw City, or Kewaunee | 32 | 68 |
| | Peoria | 35 | 65 |
| | St. Louis | 35 | 65 |

## SECTION IV

| Between— | Interchange points | Percentages East | Percentages West |
|---|---|---|---|
| 1. E-4 and W-1 | Chicago | 17 | 83 |
| | Peoria | 18 | 82 |
| | St. Louis | 19 | 81 |
| 2. E-4 and W-1 (except California) | Mackinaw City or Kewaunee. | 17 | 83 |
| 3. E-4 and W-2 | Chicago | 19 | 81 |
| | Peoria | 20 | 80 |
| | St. Louis | 21 | 79 |
| 4. E-4 and W-2 (Spokane only) | Mackinaw City or Kewaunee. | 19 | 81 |
| 5. E-4 and W-3 | Chicago | 19 | 81 |
| | Peoria | 22 | 78 |
| | St. Louis | 25 | 75 |
| 6. E-4 and W-4 | Chicago | 23 | 77 |
| | Peoria | 24 | 76 |
| | St. Louis | 26 | 74 |
| 7. E-4 (Michigan only) and W-4 | Mackinaw City or Kewaunee. | 23 | 77 |
| 8. E-4 and W-5 | Chicago | 25 | 75 |
| | Peoria | 26 | 74 |
| | St. Louis | 28 | 72 |
| 9. E-4 (Michigan only) and W-5 | Mackinaw City or Kewaunee. | 25 | 75 |

## SECTION V

| Between— | Interchange points | Percentages East | Percentages West |
|---|---|---|---|
| 1. E-5 and W-1 | Chicago, Peoria, or St. Louis | 15 | 85 |
| 2. E-5 and W-2 | do | 15 | 85 |
| 3. E-5 and W-3 | do | 17 | 83 |
| 4. E-5 and W-4 | do | 19 | 81 |
| 5. E-5 and W-5 | do | 21 | 79 |

## SECTION VI

### *Notes*

The divisions prescribed in section V shall not apply on shipments to and from points on the line of the Wabash Railroad Company when it performs service both east and west of the Mississippi River, but in lieu thereof, the divisions prescribed in appendix C shall apply.

Nothing in this report and order shall be interpreted as prescribing divisions of rates to and from points on the

Durham and Winston-Salem districts of the Norfolk and Western Railway Company.

When intermediate switching service of the Terminal Railroad Association of St. Louis, the Alton and Southern Railroad, the Illinois Terminal Railway Company, or motor carrier service is necessary to effect interchange at St. Louis or East St. Louis, the applicable charges for such service shall be payable from the eastern primary division on westbound shipments and from the western primary division on eastbound shipments.

85

## APPENDIX C

*Intraterritorial divisions and subdivisions prescribed between complainants and defendants in Sub-Nos. 1, 2, and 3*

Scales of Divisional Factors

| Miles | 1 | 2 | 3 | Miles | 1 | 2 | 3 |
|---|---|---|---|---|---|---|---|
| 50..... | 65 | — | 72 | 1,100..... | 318 | 292 | 350 |
| 100..... | 77 | — | 85 | 1,150..... | 330 | 304 | 363 |
| 150..... | 89 | — | 98 | 1,200..... | 342 | 316 | 376 |
| 200..... | 101 | 75 | 111 | 1,250..... | 354 | 328 | 389 |
| 250..... | 113 | 87 | 124 | 1,300..... | 367 | 341 | 404 |
| 300..... | 125 | 99 | 138 | 1,350..... | 379 | 353 | 417 |
| 350..... | 137 | 111 | 151 | 1,400..... | 391 | 365 | 430 |
| 400..... | 149 | 123 | 164 | 1,450..... | 403 | — | 443 |
| 450..... | 161 | 135 | 177 | 1,500..... | 415 | — | 457 |
| 500..... | 174 | 148 | 191 | 1,550..... | 427 | — | 470 |
| 550..... | 186 | 160 | 205 | 1,600..... | 439 | — | 483 |
| 600..... | 198 | 172 | 218 | 1,650..... | 451 | — | 496 |
| 650..... | 210 | 184 | 231 | 1,700..... | 463 | — | 509 |
| 700..... | 222 | 196 | 244 | 1,750..... | 475 | — | 523 |
| 750..... | 234 | 208 | 257 | 1,800..... | 487 | — | 536 |
| 800..... | 246 | 220 | 271 | 1,850..... | 499 | — | 549 |
| 850..... | 258 | 232 | 284 | 1,900..... | 511 | — | 562 |
| 900..... | 270 | 244 | 297 | 1,950..... | 523 | — | 575 |
| 950..... | 282 | 256 | 310 | 2,000..... | 535 | — | 589 |
| 1,000..... | 294 | 268 | 323 | 2,050..... | 547 | — | 602 |
| 1,050..... | 306 | 280 | 337 | 2,100..... | 559 | — | 615 |

## DEFINITIONS

Mountain-Pacific territory includes the States of Arizona, California, Idaho, Montana, Nevada, New Mexico (except points on and east of the line of the AT&SF between Raton, N. Mex., and El Paso, Tex.), Colorado (except points on and east of the Colorado & Southern and paralelling railroads between Cheyenne, Wyo., and Trinidad, Colo.), and Wyoming (except Gillette, Casper, and Cheyenne and points east thereof). See *Class Rates, Mountain-Pacific Territory,* 296 I.C.C. 555, 559.

Midwestern territory includes all territory between mountain-Pacific territory and official or southern territory.

The "border" of any territory refers to the points through which a shipment moves. When a shipment moves over lines of railroad which constitute the border of mountain-Pacific territory, the point of interchange shall be considered the border point.

## PRESCRIBED DIVISIONS

(*a*) Primary divisions of intraterritorial rates shall be percentages determined by use of the scales of prorating factors hereinabove set forth.

86 (*b*) The factor for the haul in mountain-Pacific territory shall be that shown in column 3 for the short-line distance between the point of origin or destination in transcontinental territory and the border between mountain-Pacific and midwestern territories. The factor for the haul in midwestern territory shall be that shown in column 1 for the short-line distance between the point of origin or destination in midwestern territory and the border between that territory and mountain-Pacific territory.

(*c*) When a shipment is interchanged between a complainant and a defendant at a point within midwestern territory, the primary division for the haul in such territory determined as provided in paragraph (*b*) shall be

subdivided as follows: The factor for the haul of the line performing origin or destination terminal service in midwestern territory shall be that shown in column 1 for the short-line distance between the point of origin or destination and the point of interchange, and the factor for the intermediate haul shall be that shown in column 2 for the short-line distance between the point of interchange and the border of mountain-Pacific territory.

(*d*) Subdivisions of western primary divisions of interterritorial rates between official and mountain-Pacific territories prescribed in appendix B shall be determined as follows: The factor for the haul in mountain-Pacific territory shall be that shown in column 3 for the short-line distance between the point of origin or destination in mountain-Pacific territory and the border between that territory and midwestern territory, and the factor for the haul in midwestern territory shall be that shown in column 2 for the short-line distance between the aforesaid border and the border of official territory. On an interterritorial shipment interchanged between a complainant and a defendant at a point within midwestern territory the intermediate subdivision determined as provided in the next-preceding sentence shall be further subdivided by applying to the respective hauls the factors shown in column 2 for the short-line distances between the territorial borders and the point of interchange within midwestern territory.

(*e*) In no case shall a primary division be less than 15 percent, and in disposing of fractions of 1 percent the odd 1 percent should be added to the percentage which contains the larger decimal or, if the percentages contain equal decimals, 1 percent should be added to the odd-numbered percentage, provided, however, that if the parties so agree, percentages including decimal fractions may be established.

(*f*) The parties may, if they so agree, establish percentages other than those determined as herein provided for the purpose of grouping or equalization of gateways.

## NOTES

The prescribed divisions shall not apply on traffic interchanged at Chicago by The Atchison, Topeka and Santa Fe Railway Company and the Chicago and North Western Railway Company subject to special divisions heretofore agreed upon by those companies.

The preseribed divisions shall not apply on traffic which is reconsigned or is subject to transit arrangements involving unusual out-of-line or back-haul service and is now subject to special divisions, referred to in exhibit MW-140, appendix E, as amended.

87 The prescribed divisions shall not apply on traffic subject to joint rates in which The Texas and Pacific Railway Company (including its subsidiaries) and cross-complainants in No. 31503 (Sub-No. 1) solely participate.

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### Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 21st day of March, A.D. 1963.

No. 31503

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

No. 31503 (Sub-No. 1)

AHNAPEE & WESTERN RAILWAY COMPANY ET AL.

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 31503 (Sub-No. 2)

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 31503 (Sub-No. 3)

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

v.

SAME

No. 31503 (Sub-No. 4)

LOUISVILLE & NASHVILLE RAILROAD COMPANY

v.

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

No. MC-31503 (Sub-No. 5)

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY

v.

SAME

*It appearing,* That a full investigation of the matters and things involved in these proceedings has been made, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*It is ordered,* That the complainants and the defendants in No. 31503 and No. 31503 (Sub-Nos. 1, 4 and 5), according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 1, 1963, and thereafter to apply, divisions of joint all-rail interstate rates for the transportation of property between points in official territory, on the one hand, and on the other, points in mountain-Pacific territory, determined as provided in appendix B to said report.

*It is further ordered,* That the complainants and the defendants in No. 31503 (Sub-Nos. 1, 2, and 3), according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before July 1, 1963, and thereafter to apply, divisions of joint

all-rail interstate rates for the transportation of property between points in midwestern territory, on the one hand, and on the other, points in transcontinental territory (including Montana) determined as provided in appendix C to said report.

*It is further ordered,* That the said complainants and defendants be, and they are hereby, notified and required to cease and desist, on or before July 1, 1963, and thereafter to abstain, from asking, demanding, collecting, or receiving divisions of said joint rates upon bases other than those hereby prescribed.

*And it is further ordered,* That this order shall continue in force until the further order of the Commission.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

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**Order**

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 20th day of June, A.D. 1963.

No. 31503 *

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

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* This order also embraces Docket No. 31503 (Sub-No. 1), Ahnapee & Western Railway Company Et Al. v. Abilene & Southern Railway Company Et Al., No. 31503 (Sub-No. 2), Chicago, Burlington & Quincy Railroad Company Et Al. v. Abilene & Southern Railway Company Et Al., No. 31503 (Sub-No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Same, No. 31503 (Sub-No. 4), Louisville & Nashville Railroad Company v. Akron, Canton & Youngstown Railroad Company Et Al., and No. 31503 (Sub-No. 5), Cincinnati, New Orleans & Texas Pacific Railway Company v. Same.

Upon consideration (a) of the record in the above-entitled proceedings, the report and order of March 21, 1963, and the order of April 12, 1963, herein; (b) of the petition of Mountain-Pacific carriers, defendants in the said proceedings, for modification of the effective date of the order of March 21, 1963; (c) the reply (treated as concurring petition) of the defendants St. Louis-San Francisco Railway Company and Missouri-Kansas-Texas Railroad Company; (d) the replies of the complainants in No. 31503 and No. 31503, Sub-No. 4) and a reply of the Mountain-Pacific carriers; (e) of a motion of the St. Louis-San Francisco Railway Company and the Missouri-Kansas-Texas Railroad Company to strike the reply of the eastern complainants filed May 20, 1963; and (f) of the undertaking and commitment of the said eastern complainants in and by their said replies, if the present effective date of the order of March 21, 1963, is not modified as respects the primary divisions on their traffic, to make resettlement thereof on shipments moving on and after July 1, 1963, to the basis of such modified primary divisions favorable to western lines defendants as a group as may thereafter be prescribed herein, with interest at the rate of 6 percent per annum from the customary accounting monthly settlement dates;

*It is ordered,* That the order of March 21, 1963, shall continue in effect until the further order of the Commission;

*It is further ordered,* That the said petition of the Mountain-Pacific carriers and the concurring petition of the St. Louis-San Francisco Railway Company and Missouri-Kansas-Texas Railroad Company be, and they are hereby, denied;

*It is further ordered,* That the motion of the St. Louis-San Francisco Railway Company and the Missouri-Kansas-Texas Railroad Company to strike be, and it is hereby, denied;

*It is further ordered,* That the definition of Mountain-Pacific territory in Appendix C to the report of March 21, 1963, be, and it is hereby, amended to read as follows:

> Mountain-Pacific territory includes the States of Arizona, California, Oregon, Washington, Idaho, Montana, Nevada, New Mexico (except points on and east of the line of the AT&SF between Raton, N. Mex., and El Paso, Texas), Colorado (except points on and east of the Colorado and Southern and paralleling railroads between Cheyenne, Wyo., and Trinidad, Colo.) and Wyoming (except Gillett, Casper, and Cheyenne and points east thereof). See *Class Rates, Mountain-Pacific Territory,* 296 I.C.C. 555, 559.

*And it is further ordered,* That the second ordering paragraph of the order of March 21, 1963, be, and it is hereby, amended to read as follows:

> *It is further ordered,* That the complainants and the defendants in No. 31503 (Sub-Nos. 1, 2, and 3) according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before July 1, 1963, and thereafter to apply, divisions of joint all-rail interstate rates for the transportation of property between points in midwestern territory on the one hand, and on the other, points in transcontinental territory (including Montana) and subdivisions of primary divisions of joint rates between Official territory and Mountain-Pacific territory prescribed in the next-preceding paragraph determined as provided in Appendix C to said report.

By the Commission.

HAROLD D. MCCOY
Secretary

(SEAL)

[491] [322 I.C.C. 491]

INTERSTATE COMMERCE COMMISSION

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No. 31503 [1]

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AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

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*Decided December 31, 1963*

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1. Findings in prior report of March 21, 1963, 321 I.C.C. 17 modified on reconsideration. Order entered.
2. Petition of complainants Missouri-Kansas-Texas Railroad Company and St. Louis-San Francisco Railway Company for further hearing denied.

* * * * * * * * * * *

**Supplemental Report of the Commission**

HERRING, *Commissioner:*

In our original report and order in these proceedings, dated March 21, 1963, we prescribed a comprehensive re-

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[1] This report embraces also No. 31503 (Sub-No. 1), Ahnapee & Western Railway Company et al. v. Abilene & Southern Railway Company et al.; No. 31503 (Sub-No. 2), Chicago, Burlington & Quincy Railroad Company et al. v. Abilene & Southern Railway Company et al.; No. 31503 (Sub-No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Same; No. 31503 (Sub-No. 4), Louisville & Nashville Railroad Company v. Akron, Canton & Youngstown Railroad Company et al.; and No 31503 (Sub-No 5), Cincinnati, New Orleans & Texas Pacific Railway Company v. Same.

adjustment of divisions, including certain subdivisions thereof, of joint rail rates between transcontinental territory as defined in the report, on the one hand, and eastern and midwestern territories, on the other hand, effective July 1, 1963. A petition for postponement of that date, filed by the transcontinental defendants, was denied by our order of June 20, 1963, which also clarified the findings and order. Later a three-judge United States District Court for the Southern District of California, Central Division, granted an interlocutory injunction against enforcement of our orders, subject to the condition that if they were later permitted to become effective as of July 1, 1963, the eastern and midwestern complainants would be indemnified.

492 Later a number of petitions were filed by various interested parties seeking reconsideration of our findings and orders, some of which are of broad scope and others are directed to comparatively minor and incidental features. Replies to those petitions were also filed by opposing parties. These petitions and replies are more fully referred to infra.

### Petitions of the Transcontinental Rail Carriers and Mountain-Pacific State Commissions

These petitioners are the intervening State commissions referred to in our original report and the Arizona Corporation Commission which was permitted to intervene thereafter and the rail carriers which were both defendants and cross-complainants in Nos. 31503 and 31503 (Sub-No. 1). The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (CMStP&P) is not among those carriers, although it has a line extending to the Pacific Northwest. In these proceedings it has chosen to align itself with the midwestern railroads, and for that reason statistics relating to its operations have not been included in various comparisons pertaining to transcontinental transportation

except as specifically indicated. Its participation as a transcontinental carrier in the traffic considered here is so small as to be negligible, as indicated in the original report.

The prayers in these petitions are that we reconsider our findings, presumably so as to maintain the present divisions of the defendants. The contention previously advanced by them and the interveners other than the California Public Utilities Commission that the defendants should receive an increase in revenue of 10 percent from the divisions under consideration is not renewed. The California commission expressly disclaims such a contention.

Most of the criticisms of our report contained in these petitions pertain to matters which, we believe, were sufficiently discussed in that report. However, certain features thereof deserve some further explanation in the light of the petitions.

*Cost of service.*—It is charged that our report "deals with the cost issues in total disregard of the physical facts which compel the movement of transcontinental traffic over a series of mountain ranges in mountain-Pacific territory as contrasted with the low-cost bridge service across the midwest and the movement in the portion of the East where the terrain is level."

Here, as in most similar cases, all three contending groups presented voluminous evidence describing
493 the physical conditions relating to railroad operation. Any attempt to draw conclusions from this evidence appeared unnecessary in view of the large amount of cost evidence based on territorial Rail Form A computations which relate all of the costs to all of the work units for each group of roads, and thus automatically reflect for each group the ultimate effect on costs of all operating conditions and other physical features, such as mountains, plains, and intermediate or bridge operations.

The restatement of costs contained in our report is based on the defendants' costs, applied to defendants' traffic study, and includes their Rail Form A applications which reflect territorial differences, embracing their adjustment for fuel consumption based on grades and curves considered necessary to allow for onerous operating conditions in mountain territory, and their wage, fuel, and line-haul switching adjustments which, they say, reflect bridge service. Furthermore, the restatement includes all of their other adjustments except the six which were rejected. These will be further considered infra.

The defendants contend that the above rejection unlawfully imposed an unjust burden of proof upon them, and that our proper course should have been (1) to dismiss the complaints for lack of reliable evidence, (2) to accept their evidence in the absence of offsetting proof from their opponents, or (3) to order the latter to produce certain data in their possession thought to bear on the question. Whether we could lawfully or properly follow the third course in adversary proceedings based on formal complaints is not clear. We have taken action of that kind occasionally in investigations on our own motion, where it appeared necessary to assume some responsibility for the development of the record. In the prehearing conference in the instant cases the advisability of instituting an overall general investigation was discussed but the defendants opposed the suggestion, and the matter was dropped. Upon the facts of record as a whole we believe that the existing divisions are shown to be unjust, unreasonable, and inequitable and that justice would not be served by dismissal of the complaints. Nor do we see in the record any basis for assuming that the eastern and midwestern complainants withheld vital evidence merely because they had different conceptions of the nature and extent of facts to be developed.

The discussion of the six components of the defendants' cost studies for which we made substitutions covered approximately one-fourth of our original report. It
494 was based entirely on evidence of record and at this point only a few additional comments seem necessary.

(1) The defendants contend that our use of the so-called 7-day studies in lieu of their special studies of empty-return movement was erroneous. It is difficult to ascribe the empty movement of a car to a particular commodity or class of traffic because of the variety of the lading, and the fact that cars used occasionally for hauling transcontinental traffic may at other times serve widely different uses, including local movements within each territory as well as to, from, and between other territories. The defendants urge that insufficient consideration was given to special cars, such as those used for automobile parts, which are assumed to have an empty-return movement of approximately 100 percent. They would be included in the 7-day studies, tending to increase the empty-return ratios in all territories. Here they accounted for only about 4 percent of the total movement, contrary to the situation mentioned in our report in *Louisville & N. R. Co.* v. *Akron C. & Y. R. Co.*, 309 I.C.C. 491, 506, 509.

Many special studies of empty-return movement were undertaken in these proceedings, each showing a different result. The deficiencies in the defendants' studies of general-purpose boxcar empty return, as stated in our prior report, are so serious in our opinion as to render them without value. We adhere to our prior finding that the 7-day studies made under an order of the Commission and based on uniform instructions to all the railroads as to how the studies were to be made, afford a more reliable basis of comparison among territories. Moreover, on the basis of the evidence in this record, the 7-day studies provide appropriate comparitive ratios to the traffic in issue.

(2) The defendants contend that in our treatment of roadway costs we were guilty of an "irrational departure from previously accepted principles." They find those principles in an observation made in a report dealing with transcontinental divisions on a record made in 1929 and earlier years, in which certain system-average statistics were criticized, *Divisions of Freight Rates,* 203 I.C.C. 299, 335. We do not interpret that report as affording defendants the broad support for their methods which they claim. Nor can we attach authoritative significance to a quoted statement by their principal cost witness made at an informal prehearing conference in 1940 when he was a member of our staff.

In essence the theory of the defendants is that there is a single constant cost for "maintenance of way and
495 structures—running" applicable to each mile of track anywhere in the United States regardless of the effect on costs of such features as grades, curves, and tunnels. The reliability of the defendants' computations is dependent on 4 assumptions: (*a*) that there is a "constant" expense for all track mileage in the country *which does not vary* with density; (*b*) that this "constant" is the same for *all* railroads in *all* sections; (*c*) that total roadway expense varies *directly* with density, the relationship being shown graphically as a straight line and not a curve; and (*d*) that the "constant" per track-mile can be determined by regression. Our inability to accept the validity of these assumptions was based on evidence of record, and was, we believe, sufficiently explained in the original report. Additionally, it should be noted that in spite of the greater cost per mile of maintaining roadway with grades, curves, and tunnels in mountains than in plains territory, the cost per thousand revenue gross ton-miles was $0.6178 in mountain-Pacific territory and $0.6893 in midwestern territory. The defendants assume, and wish us to accept as a fact, that this greater cost in the Midwest is caused by a large proportion of branch line

mileage which is not used by the traffic at issue but which increases the territorial average cost.

The following information which is based on railroad system totals for the year 1956 should clarify this issue:

| Item (1) | Source: MW-743, part I sheet 4 (2) | Mountain Pacific (3) | Midwestern (4) |
|---|---|---|---|
| 1. Percent that branch line mileage is of total mileage of all lines ..... | line 1(c) | 31.5 percent | 31.7 percent |
| 2. Percent that branch line traffic is of all traffic (trailing ton-miles) ..... | line 5(c) | 2.0 percent | 3.1 percent |
| 3. Main line density (freight MTTM per mile of running track operated) .... | line 7(b) | 8,474 | 4,804 |

These figures show that the proportion of branch line mileage for each group is almost the same and the amount of traffic on branch lines is so small that some other factors cause the lower unit cost in mountain-Pacific territory. The principal factor is clearly the high density of traffic, 76 percent higher than the Midwest.

496 Although the cost per mile may be somewhat higher in mountainous territory, this higher cost is shared by so many more tons of traffic that the cost per ton-mile is lower.

It is the light density on the main lines in the Midwest which causes the higher costs. These lines are used by bridge traffic, and it is, therefore, quite correct to charge this bridge traffic with its proportionate share of maintaining the lines over which it moves.

On page 41 of the former report we said:

> The information available from both the abandonment dockets and the light density class II roads shows a definite relationship between density and constant cost per mile of track; i.e., the higher the density the greater the constant cost.

Defendants' interpretation of this sentence as meaning that constant cost is variable with changes in service units was not intended. We therefore clarify it to read as follows:

> The information available from both the abandonment dockets and the light-density class II roads shows a definite relationship between density and constant cost per mile of track, and that the constant cost per mile is different for each density group, the constant for the lower density groups being smaller than those for the higher density groups.

The general principle is that although constant cost does not vary with individual units of output, a given actual amount (body) of constant cost is valid only at a particular level of output and for a specific size of plant facility, and that when either changes substantially the actual amount of constant will be different and the relationship between out-of-pocket and constant costs should be analyzed for each level of traffic, i.e., density.

(3) Criticizing the treatment of locomotive costs in our restatement, the defendants raise two questions:

> (a) Why the selection of "the gross ton mile method" instead of diesel unit-mile basis; and (b) Why the substitution of territorial average locomotive costs for the cost per diesel unit-mile employed in the mountain-Pacific lines' study.

The gross-ton-mile method is employed in applying Rail Form A, and more adequately reflects the service per-

formed by locomotives in the respective territories which contain differing geographic operating characteristics.

Apart from that fact, there was evidence here sup-
497 porting its use, some of which based on fuel consumption was introduced by the defendants in an early stage of the hearings. They urged that the best method of assigning locomotive costs was on the basis of fuel consumption. The use of a fuel consumed basis produces about the same relative costs as the gross-ton-mile basis. Later the defendants switched to the diesel unit-mile basis claiming it should produce the same results as the fuel consumed basis. We consider the unit-mile basis unconvincing in the light of the evidence that the diesel unit-mile basis of computing locomotive costs has two weaknesses: first, a common unit cost was used by defendants for all three territories thereby concealing territorial differences, and second, the assignment of diesel units was on a theoretical rather than an actual basis in mountain-Pacific and official territories.

Our substitution of the respective territorial average locomotive costs, in lieu of a common unit cost for all 3 territories favored by the defendants was made in the belief that their method concealed territorial differences which the study was ostensibly intended to disclose

(4) The comments in the next preceding paragraph apply also to our reliance on the Rail Form A car-mile cost, which indicates the actual costs of individual roads, aggregated by groups. This approach, we believe, more reliably reflects relative car-repair expense in the compared territories than the uniform cost used by the defendants in their study.

(5) The defendants criticize our rejection of their theory that certain of their branch lines should be considered exclusively useful for transcontinental traffic, which was therefore chargeable with 100 percent of the expense of their facilities and operation. As fully explained in our

original report, we were unable to accept the premise that a proportion of as little as 50 percent of such traffic on a branch indicates such a degree of dependence thereon as to support the differentiation. As we recognize the "solely related" concept, two conditions must be met in its application: (*a*) that the facilities and the expenses are used and incurred exclusively (100 percent) for the traffic or service, and (*b*) that the facilities and expenses would be eliminated with the disappearance of the traffic or service.

The transcontinental lines' "solely related" branch lines and short lines do not meet the above conditions. The lines treated as "solely related" by defendants needed to be only 50 percent "related" to transcontinental traffic.

498 The branch lines and short lines are not operated exclusively for transcontinental service even in the broadest sense, and it would be impossible to eliminate the branch lines and short lines without interfering with the flow of nontranscontinental traffic. Furthermore, we criticized the methods employed in estimating the proportion of transcontinental traffic. Admittedly, the financial bearing of this point is comparatively slight, but the principle involved justifies the attention given to it in our original report, and we are not persuaded by the defendants' petition that our views were unsound.

(6) In our original report we discussed the differences of opinion among the parties as to whether the investment base should be book investment or elements of value and whether the rate of return should be 4 percent or 6 percent. The defendants reiterate their contentions on this point, citing *Lumber, California and Oregon to California and Arizona,* 308 I.C.C. 345, 362, where we said that return for the use of capital to provide equipment and other property was an element of transportation cost, pointing out that the respondents there (defendants here) had included nothing for return on investment in a cost study

intended to prove that their proposed rates were not below a reasonable minimum. We therefore added a cost of return at 4 percent, a figure widely used for such purposes. We regard it as fair for present purposes.

Generally it is the view of the defendants that our restatement "represents a new cost study that has not been tested either by affording the parties an opportunity to check the calculations, or by permitting cross-examination with respect to the judgments or assumptions underlying the figures." They assume that there must be essential working papers and other data in our files to which they should have access to determine whether the restatement was calculated correctly.

Our substitutions before referred to closely reflect the record and no other data were resorted to. All the costs shown in our original report, and specifically the restated costs and Rail Form A costs in columns (3) and (4) on page 47 thereof, are based on the cost evidence of record as shown by appendix D hereto. The defendants' contentions furthermore reflect a view which differs from ours as to the weight to be accorded the cost evidence of record. The purpose of the defendants' study was to support their argument that, not only should their revenues from this traffic not be reduced, but that those revenues should be increased 10 percent by the establishment of new divisions based on distance scales which, they said, would produce that result. The evidence used in our restatement was convincing that their studies
499 as presented could not justly be given the intended weight. Also consideration of the restatement indicated with some force that revenues of the eastern and midwestern lines derived from the present divisions are too low in relation to costs.

*Revenue need.*—The petitioning defendants claim that:

> Where the Commission undertakes to base a change in divisions on the ground of "revenue need," it is

axiomatic that the Commission must: (1) find the amount of revenue which its order would transfer; (2) find that such a transfer is necessary to meet the fair proportion of the complainant carriers' revenue that should be met from the traffic at issue; and (3) find that the transfer will not unduly impair the defendant carriers' ability to meet their own revenue needs. None of these findings are made in the report in this case. The report does not even find the overall revenue effect of its order much less its effect on individual roads. The report of one dissenting Commissioner refers to "estimates" of revenue effect [p. 79] but the source and nature of such "estimates" is not revealed. Nor is any reason given why such findings, traditionally made in other divisions cases in which the revenue need basis has been invoked (e.g., *New England Divisions,* 66 I.C.C. 196, 206, affirmed 261 U.S. 184 (1922)), have not been made in the present case.

These contentions are grounded on erroneous assumptions of fact and of law. Our prescription herein of just and equitable divisions for the future is in no sense a "transfer" of money nor is it based solely on revenue needs. As the Supreme Court stated in *Interstate Commerce Commission* v. *Hoboken R. Co.,* 320 U. S. 368, at 381, where carriers are unable to agree as to divisions, the prescription thereof for the future "is not a mere partition of property" but "is one aspect of the general rate policy which Congress has directed the Commission to establish and administer in the public interest."

There is no single yardstick or criterion which can be employed in determining fair divisions. *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 359. The question of what constitutes just and reasonable divisions involves the making of practical judgments and cannot be solved as though it were a mathematical problem. *Boston & Maine R.R.* v. *United States,* 208 F. Supp. 661, 675. In every divisions case it is customary to receive evidence

relating to revenue need, the term which briefly covers "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation."

Our authority under the above provision of section 15(6), which requires due consideration, among other
500 things, to revenue need, is not limited in concept or scope. We are thereby authorized "to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property," as well as "the revenues, expenses, taxes and returns attributable to the service covered by the divisions under consideration." *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 360, 370. We are free to give such evidence the weight which the particular circumstances appear to justify. In our determination herein we have received and considered evidence in relation to these as well as all factors concerning the public interest in maintaining all essential parts of the transportation system in effective working condition, including the beneficial and alleged detrimental aspects of the prescribed divisions. We reject petitioning defendants' contention concerning their greater costs and revenue needs as unsupported by evidence of record. In our opinion there is no substantial evidence which would warrant a finding either that they are entitled to an increase in their divisions or that the present divisions are fair and should be maintained. The evidence of record is substantially to the contrary.

There is no rule, statutory or otherwise, requiring that, as a condition to the exercise of our authority in cases involving divisions, we must find in terms of dollar amount the difference between the revenue produced by lawful

divisions as compared to the revenue produced by unlawful divisions. Nor is there authority to support the contention that such evidence as to revenue need can only be considered when it is possible to make the three findings suggested above. See, for example, to the contrary, *Divisions of Freight Rates,* 156 I.C.C. 94, 95 (order sustained without the question being raised, *Beaumont S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74); *Official-Southern Divisions,* 289 I.C.C. 4, 5.

The petitioning defendants' contention that their three suggested findings have traditionally been made in other divisions cases in which the revenue-need doctrine has been invoked is not valid. In some proceedings of limited scope there may be evidence supporting a fairly accurate estimate of additional revenue which may result from increased divisions, but this has not been true of the larger interterritorial divisions cases, such as this. In the *New England Divisions case,* 66 I.C.C. 196, 206, cited as an example, it was possible to estimate that the
501 temporary increase of 15 percent in the divisions of the New England railroads there ordered would increase their revenue to the extent of about $7.5 million per year. Under the circumstances of that case the special needs of the New England lines were known and could not be met by granting a full increase in rates under Ex Parte 74, *Increased Rates, 1920,* 58 I.C.C. 220, 246-247. Our divisions order was directed to accomplishing that objective and was held by the Supreme Court to be a supplement to, or modification of, that entered in Ex Parte 74. See *New England Divisions Case,* 261 U.S. at 196. While the Commission considered and discussed how the benefit to the New England lines greatly outweighed any detriment to their western connections, there were no formalistic findings such as those which the petitioners say are essential. The inapposite reliance on that decision is evident from the dissenting opinion of Commissioner Hall (p. 209) in which he criticized the Commission for not making find-

ings of that kind. It should be noted that in affirming the Commission's order, the Supreme Court did not require formalistic findings in that regard or as to the amount of revenue involved.

A somewhat similar question later arose in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 198 I.C.C. 375, 380, where the defendants therein (eastern complainants here) urged that "when 'financial needs' of weaker lines are made the controlling factor in a divisional case the Commission must specifically find that the divisions prescribed are necessary in order to maintain such lines 'in effective operation as part of an adequate transportation system.'" The Commission's comment was as follows:

> Nor do we understand that financial conditions can be given weight only as a kind of last-resort remedy to prevent immediate abandonment of the weaker road, as implied by this contention.

That decision was sustained in *Baltimore & O. R. Co.* v. *United States, supra,* wherein the Supreme Court found no support for the claim that the Commission had given undue weight to financial needs. To the contrary, the holding was of directly opposite tenor, stating (298 U.S. at 359-360):

> The report shows that the Commission received much evidence bearing upon the standards set by § 15(6) to govern it in making the divisions. Appellants' claim that the order rests exclusively upon the southern lines' financial needs is negatived by the record. Many other facts were shown to have
> 502 been presented and considered. There is no requirement that the Commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached. Useful precision in respect of either would be impossible. And it would be futile upon the record to at-

tempt definitely to ascertain the weight assigned to any fact or argument in prescribing the divisions. We find no support for appellants' claim.

These petitioners lay much stress upon what they consider improper reference to passenger deficits in our report on the ground that there was a lack of reality in such use and no explanation of the nature and meaning of the passenger deficit statistics referred to. The significance of the term *passenger deficits* is well known. They have been generally regarded as having an important bearing on the financial condition of the railroads, particularly in the years since 1946 when they have amounted to an annual total for all class I railroads ranging from about $400 million to $723 million.

The serious implications of these deficits impelled us in 1956 to institute an investigation concerning them which was the subject of a report 3 years later, *Railroad Passenger Train Deficit*, 306 I.C.C. 417, in which we said (p. 479):

> One thing, however, is abundantly clear. For more than a quarter of a century, excepting the brief span of World War II, the expense of performing this service has regularly exceeded associated revenues. The financial loss is real; it is large and appears to be growing; and it endangers the present and future welfare of the railroad industry.
>
> Nothing can be gained by ascribing blame to any particular circumstance or interest. The causes are many and complex—no single one more culpable than any of the rest. Yet, if this threat to realization of the objectives of the national transportation policy is to be substantially lessened, responsible efforts in this direction must reckon with facts as they are. If the statistical trends of 25-odd years prove any one thing, it is the folly of awaiting more fortuitous events.

In a statistical table appended to that report it was shown that in the 10 years between 1947 and 1957, when the deficit reached its peak, the increase for the United States as a whole was 23 percent, for the eastern district 12 percent, and for the western district 37 percent. This is the period principally covered by the statistics of record, and the showing is relevant to any comparison of railroads in the eastern and western districts pertaining to financial condition.

503 The figures comparing passenger deficits and net railway operating income from freight service set forth in our original report, which the petitioners criticize, did not exhaust the evidence of record bearing on this point. From the various financial exhibits presented by the midwestern complainants it is possible to compute the passenger operating ratios of all transcontinental class I defendants and the eastern class I complainants which performed passenger service for years before 1959, and they are shown in the following table together with ratios for the United States and the western district taken from the report last above referred to (p. 487).

*Passenger operating ratios*

| Year | United States | Eastern district and Pocahontas region | Western district | Transcontinental defendants |
|---|---|---|---|---|
| 1946 | ..... | 102.8 | ..... | 99.9 |
| 1947 | 117.47 | 116.3 | 118.99 | 116.8 |
| 1948 | 127.38 | 123.8 | 132.16 | 128.5 |
| 1949 | 136.67 | 129.3 | 147.16 | 143.7 |
| 1950 | 124.00 | 119.2 | 130.62 | 128.8 |
| 1951 | 134.19 | 129 | 141.95 | 143 |
| 1952 | 131.62 | 126.1 | 139.28 | 138.9 |
| 1953 | 137.95 | 127.7 | 152.15 | 154 |
| 1954 | 138.16 | 123.5 | 157.60 | 163.7 |
| 1955 | 137.60 | 125 | 154.81 | 158 |
| 1956 | 140.66 | 126.8 | 159.62 | 164.5 |
| 1957 | 144.41 | 130.4 | 162.76 | 168.8 |
| 1958 | ..... | 119.9 | ..... | 160 |

These figures are significant in their showing that in the peak year 1957 the passenger operating ratio of the transcontinental lines was 44.5 percent greater than it was 10 years earlier, a much larger increase than that of any other group. This increase was responsible for what those lines term their "relatively static earnings" and their "revenue need problem," evidenced by their purported average rate of return of 3.94 percent in 1948-57, compared with 3.91 percent in 1947. In the same 10 years their average freight revenue per annum was 28 percent higher than the figure for 1947, the corresponding increase for the other railroads of the United States being 16 percent. Their freight operating ratio in this period was 64.6 percent compared with 67 percent in 1947.

In our discussion of passenger deficits there was no "departure from prior norms" said to have been
504 recognized in past decisions relating to freight rates or divisions thereof, as the defendants charge. In *Increased Freight Rates, 1948,* 276 I.C.C. 9, which they cite, the Commission discussed passenger deficits in considerable detail, saying:

> As will be shown, the passenger service presently appears to be conducted at a substantial loss, considering the railroads as a whole. As here only freight rates and charges are in issue, the users of that service insist that they shall not be required to bear the burden of the passenger deficit, and take the position that each branch of the service should pay its own way, or in any event, the deficit should be localized to the roads or territories in which the loss from passenger traffic is most pronounced. [p. 30]

In 1948 passenger operating ratios in the West were higher than those in the East, but it was not feasible in that proceeding to localize the deficits as above suggested. The Commission said (p. 35) that "we have felt compelled in a general rate case to take the passenger deficit into

account in adjustment of freight rates and charges. • • • and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations."

Due in part to the general rate increase of 1948 and others in later years the average annual freight revenue of all class I railroads in the 10-year period, 1949-58, was 20 percent higher than it was in the 3 years, 1946-48. The increase for the eastern railroads was 14 percent and for those in the western district it was 26 percent. In 1957 the passenger operating ratio of the western district was 23 percent higher than it was in 1948, and the increase in that of the eastern lines in the same period was 5 percent. These differences are necessarily and unfairly obscured by comparing only the net railway operating income from all services in considering the respective revenue needs of the two groups.

In numerous cases involving divisions the Commission has given consideration to unequal passenger operating ratios as bearing on the respective revenue needs of the contesting groups. The first major instance was *Divisions of Freight Rates,* 148 I.C.C. 457, affirmed 282 U.S. 74. The opponents in that case were southwestern railroads and western trunklines. After stating that neither group was receiving a return of 5.75 percent the Commission said (p. 474):

505 The problem is to spread this deficiency between freight and passenger service on a basis fair for present purposes of comparison. The statistics show that the relation between freight and passenger revenues was about the same in both groups, but that the passenger operating ratio was slightly higher in the western trunk-line group than in the Southwest. We have, therefore, first apportioned to passenger revenues in the former group enough of the deficiency to make the passenger operating ratio

> the same as in the Southwest, and have then apportioned the remainder between the two services in the ratio of their revenues as thus modified. In the case of the southwestern group, we have apportioned the deficiency between the two services in the ratio of their revenues without such prior modification.

This method of allowing for different passenger operating ratios in determining just divisions of freight rates has been followed in numerous decisions. The first such instance was *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729, 753, 755, where the Commission said:

> Defendants contend that the slightly less favorable financial situation of the southern roads, disclosed by this study, is due to losses of passenger revenue and that the official lines should not be called on to absorb the passenger deficiency in the South through a readjustment of divisions of freight rates. With this contention there is little room for disagreement. • • • Defendants' suggestion that comparisons of earnings should take into account the indicated greater profit from passenger service in the eastern district is of more merit.

The same principle and statistical method was also employed in the following later decisions: *Southwestern-Official Divisions*, 216 I.C.C. 687, 698, 708; *Florida East Coast Ry.* v. *Atlantic Coast Line R. Co.*, 235 I.C.C. 211, 236-7; *Official Western Trunk Line Divisions*, 269 I.C.C. 765, 772; *Gardner* v. *Akron, C. & Y. R. Co.*, 272 I.C.C. 529, 573 ff.

Making allowance for such differences in comparing net railway operating income from all services cannot be interpreted as implying a need for "wholesale discontinuance of passenger service," as the petitioners charge. We regard them as important in connection with the claimed revenue needs of the transcontinental defendants discussed in our original report. Furthermore, they refute the con-

tention that controlling weight should be given to comparisons of net railway operating income from all services in 1955, 1956, and 1957 when the disparity in the passenger operating ratios of the eastern and western railroad groups reached its maximum.

506 *The prescribed divisions.*—The petitioning defendants say that there is a lack of any rational basis for the newly prescribed divisions. Urging that we did not correlate the prescribed divisions with any findings respecting relative costs or relative revenue needs, they claim that the primary error in the prescription of the new divisions between official and transcontinental territories lies not with the mechanics of the groupings but in the percents prescribed.

We found it inadvisable to use a mileage scale for determining such divisions for the principal reason that it seemed desirable to maintain the existing groups agreeing with the defendants "that the present group basis of publishing transcontinental divisions is highly desirable in the light of competitive conditions affecting the routing of transcontinental traffic." Our substitution of three groups in transcontinental territory for the single group in effect today corrects an inequitable existing situation in which the revenue received by the defendants from eastern transcontinental rates on shipments to and from intermediate territory, i.e., Phoenix, Ariz., Spokane, Wash., and Reno, Nev., is relatively greater in comparison with transportation service than the amounts which they receive on traffic to and from Pacific coast port districts. The groupings provided in appendix B reflect in a general way the gradation of the rates proposed by the railroads and approved by the Commission in *Class Rates, Mountain-Pacific Territory,* 296 I.C.C. 555. From the standpoint of distance and cost of service they are preferable to the blanketing of transcontinental territory in one group.

The petitioning defendants criticize this structure and concept of our original report, claiming as irrational "re-

liance upon class rates for groups and ignoring differences in class-rate levels for divisions" in appendix B, and "ignoring groupings and recognizing a difference in class rate levels for divisions" in appendix C. In the prescription of just and equitable divisions the matter of rate level is not controlling since our objective is to prescribe fair proportions of revenue whether the rates be on a high or a low level. In fixing such proportions it is the relative contribution of the parties, in terms of costs, that furnishes the initial indication of what is just and equitable among the carriers. With respect to the alleged failure to employ groupings in appendix C, the record will not permit a complete prescription of divisions on a group basis therein since the present midwestern groups are not well defined.

507 In determining just, reasonable, and equitable divisions herein, the process we employed was one of practical judgment and not of mere mathematical computation. We found it impossible to use any existing divisional scale, a cost scale, or any method suggested by the parties as an exclusive guide or specific pattern for the divisions to be prescribed. In our view of what the evidence shows as to the equities of the situation, we necessarily had to exercise our judgment. For example, the cost evidence indicated that the present divisions gave the eastern carriers a smaller margin of revenue above out-of-pocket costs than those of the western carriers. The evidence concerning financial and traffic statistics also disclosed that the trend in the earning power of the eastern roads as freight carriers since the end of World War II has been much less favorable than that of the western roads. Comparison of net railway operating income from all services, however, does not fully show that trend for the reason that the passenger operating ratios of the western roads in this period increased to a much greater extent than those of the eastern carriers. All of these elements, in our judgment, warranted an increase in the divisions of

the eastern carriers, and appendix B was formulated with that objective in mind.

There is evidence which supports the soundness of this judgment. An exhibit introduced by the midwestern lines shows group origins and destinations of 319 carload shipments in 1953 between official and transcontinental territories taken from our 1-percent waybill study, on which the total revenue was $320,930. Of this amount the eastern lines received $69,928 (21.8 percent), under existing divisions, and the western lines received $251,002 (78.2 percent).

It was shown that application of the divisions recommended by the examiners would have increased the eastern share to $76,306 (23.8 percent) by an average increase in the present individual eastern divisions of 9.12 percent. The latter figure was slightly less than average increase of 9.73 percent proposed by the examiners for the midwestern lines on midwestern-transcontinental traffic.

Upon consideration of this and other evidence of relative costs and revenue needs we concluded that the divisions recommended by the examiners on official-transcontinental traffic failed to do justice to the eastern complainants. The prescribed divisions followed the same
508 general plan as those which were recommended in that they were based on present groups in the East and were 15 percent for the westernmost Illinois group (E-5). For movements between the E-4 group, immediately to the east, and W-1, the Pacific coast group, via Chicago the prescribed percentage is 17 in lieu of 16, as recommended. Similarly the recommended E-3 (Pittsburgh) percentage, 20, was increased to 22, and the Seaboard-New England group recommended percentage, 32, was increased to 34.

On the 319 shipments before mentioned the prescribed divisions would have yielded revenues to the eastern lines of $81,370, a little more than 25.3 percent of the total,

representing an average increase of about 16.4 percent in the present divisions. On pages 41 and 45 of our original report the indicated costs of the eastern lines were shown as 26.1 percent. We are therefore of the view that from the standpoint of both cost and revenue needs the prescribed divisions are not in excess of a fair and reasonable level. They would have returned to the eastern roads a share of the revenues slightly less than their share would have been in proportion to out-of-pocket costs based on the above traffic. We find that the divisions prescribed are necessary, in the public interest, to maintain all essential parts of the transportation system in effective working condition.

With regard to the scales of divisional factors prescribed in appendix C for service in western territory, the petitioning defendants state that they are not properly constructed or justified by cost. This contention incorrectly assumes that the construction of a divisional scale is primarily a matter of costs and mathematics. As the Commission pointed out in *Official-Southern Divisions,* 289 I.C.C. 4, 6-7, costs do not control the contours of rate scales and in a division case "it is equally true that discretion and flexibility of judgment have attended the use of costs, particularly in determining the contours of divisional scales involving the relation of terminal and line-haul cost elements," and "due consideration of the respective situations of long-haul and short-haul carriers requires that the solution be based on judgment rather than formula." A similar view was recently sustained in *Boston & Maine R. R.* v. *United States,* 208 F. Supp. 661, 675, affirmed 371 U.S. 26.

The discussion in our original report, pages 76-77, makes it is clear that appendix C reflects the 29886 scale, adjusted to conform to what the eviednce herein required, with 10 percent higher factors in mountain-Pacific territory. We have in the past employed rate scales as a suitable foundation for constructing divisional

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scales to divide joint rates in proportions we deem proper under the evidence. *Divisions of Freight Rates,* 156 I.C.C. 94, 96-97, 99.[2] Moreover, it is reasonable to divide the rates to some extent in accordance with the way they are made and in this case the 10 percent higher factors for mountain-Pacific territory with other adjustments give fair recognition to the evidence as to cost of service and revenue needs.

*Miscellaneous.*—The defendants object to what they term the improper exclusion of eastern New Mexico from mountain-Pacific territory, which as defined in our original report included only that part of New Mexico on and west of the line of The Atchison, Topeka and Santa Fe Railway Company (AT&SF) between Raton, N. Mex. and El Paso, Tex. That line was the boundary originally fixed in 1920 (*Increased Rates, 1920,* 58 I.C.C. 220, 225-6). Consistently the railroads voluntarily applied the so-called 28300 class rates to and from eastern New Mexico in accordance with the wish of the State Corporation Commission of New Mexico that this part of the State be definitely excluded from mountain-Pacific territory, *Class Rate Investigation, 1939,* 281 I.C.C. 213, 290-1. Our order instituting the investigation of mountain-Pacific class rates was broad enough to permit consideration of rates to and from eastern New Mexico, which, however, was recognized as being in 28300 territory, *Class Rates, Mountain-Pacific Territory,* 296 I.C.C. 555, 559. It was not intended to shift eastern New Mexico from 28300 territory into mountain-Pacific terri-

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[2] In addition, see *New England Divisions,* 126 I.C.C. 579, 667; *Southwestern—Official Divisions,* 234 I.C.C. 135, 138, 140; *Divisions of Rates, Official and Southern Territories,* 234 I.C.C. 175, 191; *Official Western Trunk Line Divisions,* 269 I.C.C. 765, 777; *Official—Southern Divisions,* 287 I.C.C. 497, 527; *Official—Southwestern Divisions,* 287 I.C.C. 553, 580; *Louisville & N. R. Co.* v. *Akron, C. & Y. R. Co.,* 309 I.C.C. 491, 511; *Akron, C. & Y. R. Co.* v. *Atchison, T. & S. F. Ry. Co.,* 316 I.C.C. 351, 366 (Appeal pending District Court, Colorado).

tory. Nor did the final order have that effect. We see no valid reason for making the change sought by the defendants.

The defendants say that "the Commission should exclude from its present order the prescription of divisions affecting any part of the competitive routes bewteen the Missouri River and Utah gateways." What the effect of such exclusion would be is not clear, but apparently it would be far-reaching. The request is based on the expressed fear that the prescribed divisions would have a serious effect on the Denver and Rio Grande Western Railroad Company (D&RGW) whose line between Colorado and Utah junctions is a link in transcontinental routes which are competitive with lines of the Union Pacific between the Missouri River and Utah gateways. In the course of the hearings the midwestern complainants raised the question of competitive conditions affecting routes through the Utah junctions, but the defendants argued that such matters were extraneous to the issues, saying in their reply to exceptions:

> Any legitimate concern the midwestern lines may have in any threat to the equalization of divisions over Utah gateways is premature. If any problems arise as to equalization of divisions over those gateways on a fair and equitable basis, they can be considered in the negotiations contemplated in the recommended report. If agreement can be reached as to any equalization involving divisions not here in issue, any related modification of the prescribed divisions to conform to the agreed equalization can be requested by joint petition.

The midwestern complainants are correct in stating that the "problem is left precisely where the transcontinental defendants insisted that it be left." We therefore see no reason for the modification of our findings sought by the defendants.

The defendants point out certain minor inconsistencies in the divisions prescribed between eastern groups E-1 and E-2 and western groups W-2 and W-3. Their criticism is sound, and correction has been made in appendix B-1 infra. They complain of ambiguity because interchange or dividing points in northern Illinois now grouped with either Chicago or Peoria were not specifically named in our report. We there stated that no dissatisfaction with the present grouping has been expressed. The evidence indicated that Springfield and Bloomington, Ill., are now grouped with Peoria in dividing rates, but other groupings of the northern Illinois junctions were not disclosed and were therefore not specified in our report. The situation is of more immediate interest to the eastern and the midwestern complainants, which apparently consider it unimportant. The defendants say that "as to cross-lake routes other than Mackinaw City and Kewaunee, there is doubt as to which percent should be applied." It was made clear in our report that throughout the proceedings the name Kewaunee has been regarded as a designation of all westbank Lake Michigan car ferry terminals.

The transcontinental defendants have filed a motion to strike certain portions of the reply to their petition
511 for reconsideration filed by the eastern complainants. Those complainants undertook to show a similarity between our divisions prescribed for them with those which would result from application of the so-called 29886 scale to two-line movements between representative eastern and western points. It was shown that the scale divisions would be the same as those prescribed in some instances and in others slightly different. Early in the hearings the eastern complainants presented an estimate purporting to show that application of the 29886 scale based on traffic of 1953 would have increased their revenue by about 3.2 percentage points, or approximately $25 million per year. Estimating that the prescribed divisions would have produced something less than that amount if they had been

in effect in 1953, the eastern complainants claim for their estimate more reliability than a projected estimate of $32 million from application of the 29886 scale shown in the defendants' evidence. Necessarily a choice between these estimates would involve assumptions concerning volumes of traffic and rate levels in the future.

The motion to strike was based on the fact that only about half of the distances used in the complainants' comparison were shown in the record. Recognizing that their use of short-line mileages for which record references were not shown might be deemed objectionable, the complainants have submitted a revised study which omits the disputed distances. In view of this substitution we consider it unnecessary to pass upon the motion.

*Petition against the order of June 20, 1963.*—After issuance of our order of June 20, 1963, before referred to, which made no change in the effective date (July 1, 1963) of our original order of March 21, 1963, the transcontinental defendants filed a petition maintaining that our June 20 order was invalid for failure to give 30 days' notice as required by section 15(2) of the act and that the order should be withdrawn and replaced with a new order conforming to the requirements of the act. Replies thereto were filed by the eastern complainants in the title proceeding and the M-K-T and Frisco. In addition, replies were also filed by the midwestern complainants in the Sub-No. 1 proceeding except the M-K-T and Frisco, embracing requests that the Commission, as a precautionary measure, issue an amending order, with appropriate recitals and a specified effective date, which would (*a*) amend the ultimate findings and the second ordering paragraph of the report and order of March 21 to explicitly include the subdivisions in western territory on official-transcontinental traffic and
512 (*b*) amend the definition of mountain-Pacific territory in appendix C of said report to include Oregon, Washington, and Utah.

We intended our report and order of March 21, 1963, to include the above matters and believed our discussion thereof in said report and the scale of divisions and subdivisions prescribed in appendix C with its explanatory notes, to contain sufficient explanation of our intention. It was our intent in entering the order of June 20, 1963, to clarify these matters, which we deemed to be already included in our report and order of March 21, 1963. We, therefore, felt that an additional 30 days' notice was not required. Accordingly, the transcontinental carriers' petition against the June 20 order is denied.

However, recognizing that the omission of additional more specific language in our order of March 21, 1963, has caused disagreement as to the effect of our clarifying order of June 20, 1963, and that as noted herein several changes and modifications are being made in specific divisions, we deem it advisable to set forth our entire findings on reconsideration at this time and enter a new order with an appropriate effective date. This will combine all divisions as originally prescribed and as amended or supplemented herein in one document. We desire to point out that the order entered herewith does not change the effective date (July 1, 1963), or any other provision, of our order of March 21, 1963 (as clarified by our order of June 20, 1963), and we will provide for the expiration of the order of March 21 upon compliance by the parties with the order entered herewith (not printed).

### Petitions of Midwestern Railroads

A petition filed generally on behalf of carriers which are complainants in Sub-No. 1 and defendants in No. 31503 prays for reconsideration of the decision on the ground that the prescribed divisions are unduly favorable to the eastern and the transcontinental lines in the light of evidence pertaining to costs of service and revenue needs. The Milwaukee, complainant in Sub-No. 3, supports that contention in a companion petition. Other separate peti-

tions were filed by the St. Louis-San Francisco Railway Company (Frisco) and the Missouri-Kansas-Texas Railway Company (M-K-T) differing in content from the others.

In the complaint in Sub-No. 1 it was alleged:

513 5. The financial needs of complainants are such that they require a substantially greater amount of revenue in order to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation; and their financial needs are greater than those of the carriers in Eastern Territory and the carriers west of Midwestern Territory.

To that end the petitioners proposed a readjustment of divisions which according to the best available estimates based on 1953 would increase their revenues by $38 million per year annually, about 24 percent, and afford the eastern lines an increase of $4 million per year, about 4.8 percent. They, therefore, express dissatisfaction with our report, which, they say, "makes substantial increases in the divisions of the eastern lines and modest increases in the divisions of the midwestern lines generally." Their criticisms are briefly summarized as follows:

> The report eliminates only part of the inflation in the divisions of the transcontinental defendants, and in its treatment of the eastern lines gives them inflated divisions which are inconsistent with the equal-factor bases of divisions prescribed during the last 15 years between official and midwestern territories and an equal-factor basis of divisions on official-western trunk line traffic to which all eastern lines subscribed in 1955.

Of the cases here referred to, only one is recent: *Akron, C. & Y. R. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 316 I.C.C. 351 (1962). We there prescribed an equal-factor basis as

above stated, although the eastern railroads, which were the complainants, asked for a dual scale more favorable to themselves. The record was comparatively limited, and our findings were not intended to deal broadly with equities affecting the eastern and western districts as a whole. There is no reason to consider that decision controlling here. The other decisions referred to in the quotation are *Official Western Trunk Line Decisions,* 269 I.C.C. 765 (1948), and *Official-Southwestern Divisions,* 287 I.C.C. 553 (1953), in which the so-called 29886 scale was prescribed. These also were narrower in scope than the instant cases, and the records reflected conditions as they were before 1952. Neither decision establishes a principle that equal-factor bases such as these petitioners have in mind shall invariably be employed.

514 To measure the alleged inflation in the prescribed divisions of the eastern lines the petitioners compare them with percentages which they compute by use of the 29886 scale. Referring to a statistical table appended to their petition, they say that the prescribed divisions "reflect inflation ranging from 3.2 percent to 25.9 percent in official territory." However, in numerous instances their method of comparison discloses no inflation, and also shows deflations ranging from 3.8 percent to 17.4 percent.

Throughout these proceedings these petitioners have urged the use of the 29886 scale as a proper basis for revising all the divisions in issue and they now use it as a criterion by which to measure what they regard as inflations in the divisions prescribed for their opponents and deflations for themselves. We rejected the unqualified use of the scale for the revision above referred to and we therefore cannot accept it as a criterion of inflation and deflation. In *Official-Southwestern Divisions,* 287 I.C.C. 553, in which it was prescribed, the average distances shown were 760 miles in the Southwest and 672 miles in the East. The extreme distance in the former territory

was about 1,200 miles. The midwestern complainants would apply it for distances up to 1,900 miles.

The midwestern complainants show numerous examples of divisions produced by our findings which support the statement in our original report that the scales in appendix C would result in "moderate increases in some of the most important midwestern divisions." It was our stated view that such increases were supported by the evidence concerning cost of service, but that the proposal of the midwestern lines gave undue weight to their claimed revenue need. They now reiterate their contention that "relative revenue needs of official territory lines vis-a-vis midwestern lines do not differ substantially." They show that in the period 1951-58 "adjusted net railway operating income" of the two groups was equivalent to a return of 3.39 percent on elements of value for the eastern lines and 3.24 percent for themselves. In this comparison there is no allowance for differences in passenger operating ratios in this period. The average of such ratios for the midwestern lines in 1951-58 was 148 and for the eastern 126.

*Equalization.*—The original proposals of both the midwestern and the transcontinental carriers relating to the divisions of rates to and from midwestern territory were
515 in the form of distance scales and included no provisions for grouping of cities or equalization of competing routes and gateways. The midwestern complainants expressly proposed that, if we prescribed divisional scales as they urged, our findings "should not be understood as preventing the carriers, by agreement, from maintaining present or establishing new groupings, or from equalizing divisions via competing routes or gateways."

The transcontinental defendants expressed general approval of divisional groups, presumably existing groups, but as before shown in this report, were opposed to any consideration of equalization in connection with our decision. They have charged us with error "in rejecting the

group basis of divisions over midwestern gateways." Our rejection, if it can be called such, was merely by way of a statement that "the parties may if they so agree, establish percentages other than those determined as herein provided for the purpose of grouping or equalization of gateways."

The midwestern complainants now ask us to modify our findings for the purpose of prescribing extensive equalized subdivisions, contrary to their former position before stated. In some instances they point out certain disparities which would result from the application of any divisional scales such as those which we prescribed and ask merely that we require equalization without suggesting the proper basis therefor. In other instances they propose specific modifications of our findings which, they say, would facilitate equalization via competing routes through the same gateway. The effect of such proposed modifications, however, is far from clear.

Their requested modifications are opposed by the Frisco and the M-K-T and the transcontinental defendants, which urge in substance that they would be unfairly burdened by the midwestern plan. As all the western carriers until now have taken the position that questions concerning equalization should be reserved for their mutual consideration after our decision, there is no evidence in the record which would be helpful to us in attempting to deal with the problem at this time. The competitive conditions among the interested carriers are closely involved, and the nature of the problem therefore is such that they should make an effort to solve it themselves before invoking a regulatory remedy.

*Miscellaneous.*—The midwestern lines make numerous suggestions in the interest of clarifying our findings mostly of a technical nature. Some of these are not controversial and have been followed in appendixes B-1 and C-1.

In our original report divisions via the cross-lake routes were prescribed only for rates to and from the north-

516 ern part of transcontinental territory, reflecting the evidence relating thereto. It now appears that rates over these routes apply to and from all points in that territory, are equalized with those via Chicago, and that a common basis of primary divisions should apply. Appendix B-1 has been worded accordingly.

The description of group E-4 in appendix B did not include a small section in northwestern Indiana. The midwestern lines ask that points on, west, and north of the line of the Elgin, Joliet and Eastern Railway Company (EJ&E) between Porter and Dyer, Ind., be included in midwestern territory. The eastern lines say that only points in Indiana in the Chicago switching district or on the EJ&E should be so included. Our revised definition conforms to the view of the eastern lines. We also agree with them that stations on the line of the New York Central between Chicago and Danville, Ill., are properly included in group E-4.

Some of the eastern complainants have lines in northwestern Illinois, Missouri, and Iowa. The midwestern lines ask that the divisions to and from points on such lines be definitely placed on the intraterritorial basis, and the eastern lines offer no objection to that course. No modification of our findings appears to be necessary for that purpose.

The complaint in No. 31503 expressly excepted divisions of rates to and from stations on the Wabash in Illinois when the Wabash performs service both east and west of the Mississippi River. A note to that effect was therefore added to appendix B. The midwestern lines ask that the note be eliminated on the ground that it is inconsistent with the treatment of points on other lines in group E-5. That elimination would not be justified in view of the issues as framed by the complaint in No. 31503. We agree with the transcontinental defendants that the inconsistency should be cured by including in the note the other railroads

similarily situated. In such cases the origination or termination of traffic in group E-5 by such carrier shall be considered to be accomplished within midwestern territory for the purposes of determining divisions and subdivisions as prescribed in appendix C-1, paragraphs (*b*) and (*c*).

The midwestern lines ask that the grouping of Flinton, Ill., with St. Louis as a primary dividing point on interterritorial traffic be specifically authorized. It may be so understood.

The CM&StP and the Illinois Central have lines in Indiana by which they participate in transcontinental traffic substantially as eastern carriers. The midwestern
517 lines therefore ask that the divisions of these two railroads to and from Indiana points be prescribed on the eastern interterritorial basis. Our power to do so is questionable under the issues in the complaints in Sub-Nos. 1 and 3. It is a reasonable assumption that revision of the eastern divisions would include the CM&StP and Illinois Central by voluntary action of the carriers involved.

In our original report no divisions were prescribed over routes through southern territory because of insufficient evidence. Neither the eastern complainants nor the transcontinental defendants are dissatisfied with that disposition, but the midwestern lines ask that exception be made as to divisions over routes through southern territory via Metropolis and Cairo, Ill., by the Illinois Central. The sole evidence referred to as supporting such an exception is a showing of some movements over the Illinois Central through the South in July 1953 without other data which would be necessary to a determination of the divisions.

### Petitions of the Frisco and the M-K-T

These petitioners seek modification of our findings as well as further hearing, which they consider necessary to

"enable the Commission to make a ruling upon a full disclosure, as contrasted with a limited disclosure of the essential facts." Their object is to avoid reductions in certain of their divisions which would result from application of the prescribed basis to specified movements considered important to them.

They present an estimate from traffic studies which they have made for October 1961, after the conclusion of the hearings, purporting to show annual losses of $423,000 to the Frisco and $132,000 to the M-K-T due to the prescribed divisions. The loss of the M-K-T would be attributable to traffic to its stations from transcontinental territory, particularly lumber. On other traffic its revenue would be increased. Of the estimated loss to the Frisco about two-thirds would be on intraterritorial traffic and one-third on interterritorial.

These petitioners particularly stress their divisions on traffic which they interchange at Kansas City, Mo.-Kans., notably lumber. The routes through Kansas City to numerous southwestern points from the Northwest are not the most direct, and the divisions apparently have been influenced by competitive conditions. They apply in connection with broad groups. For example, the division
518 from Kansas City to Dallas, Tex., on lumber is the same as that to San Antonio, Tex., the difference in distance being 277 miles.

The proposal of the midwestern complainants, based on distance scales, would have reduced some of those divisions, slightly increased some, and left others unchanged. On lumber from Eugene, Oreg., to Oklahoma City, Okla., via Kansas City, for example, the proposed midwestern division south of that point was 20.6 percent in lieu of the present 26.6 percent. The proposed reduction at Dallas was from 31.6 percent to 24 percent. Since we were unable to approve as high a general level as that of the midwestern proposal, our prescribed basis applied to these

particular movements would necessarily produce larger reductions.

The petitioners say that our order "has drastically changed the mechanics of the present group basis of divisions." This is incorrect, for we have expressly authorized departures from the prescribed basis to permit such grouping and equalization as interested carriers may agree upon in accordance with the wishes of the midwestern lines.

The situation to which the petitioners call attention was fully disclosed in the evidence of the midwestern lines and foreshadowed in the examiners' recommended report. The petitioners are therefore not in a position to claim that the effect of our decision was a surprise. We see no reason for making a special exception from our findings for these petitioners.

In their petition for further hearing the petitioners propose to supplement the record with statistics for the period 1958-62 to show that reduced divisions would have a serious financial effect on them. They say also that a further hearing would permit consideration of proposed railroad mergers in the East. We have previously denied a petition for further hearing in these proceedings for that purpose. That ground furthermore is inappropriate here because the petitioners' reduced divisions to which they refer apply principally on intraterritorial traffic. The three principal groups of complainants and defendants unanimously oppose a further hearing at this time, and we agree with them that no sufficient reason has been shown.

PETITION OF THE WABASH RAILROAD COMPANY

We stated in our original report that East Hannibal, Ill., on the Wabash, is now a dividing point on interter-
519 ritorial traffic, although no intercharge takes place there, and authorized its continued use with divi-

sions to the eastern carriers the same as those prescribed via East St. Louis, Ill. Necessarily there also would be an equalization of the primary western divisions between a point such as San Francisco, Calif., for example, and the two primary dividing points above named. However, the subdivision resulting from our findings between East Hannibal and Kansas City, an intermediate dividing point, would be smaller than that between East St. Louis and Kansas City because the respective distances are 199 and 276 miles.

The Wabash has filed a petition praying for a modification of our findings which would require the Kansas City-East Hannibal subdivision to be the same as that between East St. Louis and Kansas City, thus disregarding the difference of 77 miles of rail service. The midwestern lines, interested in the movement via East St. Louis, favor this equalization for competitive reasons. The transcontinental defendants having the movement west of the Missouri River are not opposed to the equalization but they criticize the proposed means of accomplishing it, saying:

> It would be more logical for the East St. Louis lines to meet the competition by reducing the East St. Louis divisions to the level of the East Hannibal divisions. Or the divisions via the two routes could be averaged, increasing the East Hannibal divisions and reducing the East St. Louis divisions. But it would be improper to protect the midwestern lines' competitive interest and increase the Wabash Railroad's revenues by increasing the divisions of the Wabash, and imposing the entire cost of the equalization on the mountain-Pacific lines.

The competitive situation here shown is similar to those involved in the proposals of the midwestern lines previously discussed. We are unable to see that the situation is so unique as to require special consideration, leaving

other problems of the same kind to be taken up by the interested carriers for reasons before stated.

On shipments which move through both Chicago or Peoria and East Hannibal the midwestern lines ask that the last-named point be considered the primary dividing point. The eastern lines oppose this suggestion on the ground that the route between Chicago or Peoria and the Missouri River gateways via East Hannibal is competitive with other routes over western lines as to which Chicago or Peoria would be the primary dividing point. We agree with the eastern view.

520 FINDINGS

On reconsideration:

1. We find that the present divisions of joint rates applicable to the transportation of property between points in eastern or official territory and points in transcontinental territory (including Montana) as between the complainants in No. 31503 (including the Missouri-Illinois Railroad Company) and in No. 31503 (Sub-Nos. 4 and 5), on the one hand, and the defendants in the said complaints, cross-complainants therein, and the complainants in No. 31503 (Sub-No. 1), on the other hand, are unjust, unreasonable, and inequitable.

2. We find that just, reasonable, and equitable divisions in lieu of those referred to in finding 1 would be those set forth in appendix B-1 hereto.

3. We find that the present divisions of joint rates applicable to the transportation of property between points in midwestern territory, as herein defined, and points in transcontinental territory (including Montana), as herein defined, and present subdivisions of joint rates between points in eastern or official territory and points in transcontinental territory (including Montana) for movements within western territory, as between the complainants in

No. 31503 (Sub-Nos. 1, 2, and 3) and the defendants and cross-complainants in the said complaints, are unjust, unreasonable, and inequitable.

4. We find that just, reasonable, and equitable divisions and subdivisions in lieu of those referred to in finding 3 would be those set forth in appendix C-1 hereto.

An appropriate order will be entered.

COMMISSIONER HUTCHINSON, whom COMMISSIONER BUSH joins, dissenting in part:

My views respecting the prescription of divisions at the levels fixed by the majority are set forth in my separate expression to the prior report of March 21, 1963, and I find no convincing support in the supplemental report to justify divisions at the levels established.

COMMISSIONER FREAS, dissenting:

My views concerning these proceedings, including the cost evidence submitted therein, are set forth in my separate expression to the original report, 321 I.C.C. at
521 pp. 79-81. I adhere to my prior opinion that the record does not support the prescribed substantial changes in the existing divisions.

VICE CHAIRMAN GOFF dissents.

COMMISSIONER TIERNEY did not participate.

## APPENDIX B-1

*Primary divisions prescribed between eastern and transcontinental territories (including Montana)*

Territorial groups in eastern territory hereinafter referred to are as follows: E-1, points heretofore embraced in the seaboard-New England group also known as groups A and B; E-2, points heretofore embraced in the interior trunkline or Syracuse group also known as group C; E-3, points heretofore embraced in the Buffalo-Pittsburgh-Bessemer groups also known as groups D and E; E-4, points heretofore embraced in the Detroit-Indianapolis-Cincinnati groups, also known as group F (except Evansville, Vincennes, and Terre Haute, Ind.), all other points in Indiana on eastern railroads not included in the Chicago switching district, and points heretofore embraced in group G; E-5, points on southern, western, or eastern railroads in Illinois south and east of the line of the Atchison, Topeka & Santa Fe between Chicago and Peoria and the line of the Gulf, Mobile & Ohio between Peoria and East St. Louis, and also Evansville, Vincennes, and Terre Haute, Ind., and other points in Indiana included in the Chicago switching district.

Territorial groups in transcontinental territory (including Montana) hereinafter referred to are as follows: W-1, points in California, Oregon, and Washington (except Spokane); W-2, Spokane, points in Nevada, Idaho, and Utah embraced in transcontinental territory; W-3, points in Arizona and New Mexico embraced in transcontinental; W-4, points in Montana west of and including Havre, Great Falls, Helena, and Butte; W-5, points in Montana other than those in W-4.

SECTION I

| Between— | Dividing points | Percentages | |
|---|---|---|---|
| | | East | West |
| 1. E-1 and W-1.. | Chicago, Mackinaw City, or Kewaunee | 34 | 66 |
| | Peoria | 36 | 64 |
| | St. Louis | 37 | 63 |
| 2. E-1 and W-2.. | Chicago, Mackinaw City, or Kewaunee | 37 | 63 |
| | Peoria | 39 | 61 |
| | St. Louis | 40 | 60 |
| 3. E-1 and W-3.. | Chicago, Mackinaw City, or Kewaunee | 37 | 63 |
| | Peoria | 40 | 60 |
| | St. Louis | 42 | 58 |
| 4. E-1 and W-4.. | Chicago, Mackinaw City, or Kewaunee | 40 | 60 |
| | Peoria | 42 | 58 |
| | St. Louis | 41 | |
| 5. E-1 and W-5.. | Chicago, Mackinaw City, or Kewaunee | 44 | 56 |
| | Peoria | 46 | 54 |
| | St. Louis | 45 | 55 |

SECTION II

| Between— | Dividing points | Percentages | |
|---|---|---|---|
| | | East | West |
| 1. E-2 and W-1.. | Chicago, Mackinaw City, or Kewaunee | 28 | 72 |
| | Peoria | 30 | 70 |
| | St. Louis | 31 | 69 |
| 2. E-2 and W-2.. | Chicago, Mackinaw City, or Kewaunee | 30 | 70 |
| | Peoria | 33 | 67 |
| | St. Louis | 34 | 66 |
| 3. E-2 and W-3.. | Chicago, Mackinaw City, or Kewaunee | 32 | 68 |
| | Peoria | 36 | 64 |
| | St. Louis | 37 | 63 |
| 4. E-2 and W-4.. | Chicago, Mackinaw City, or Kewaunee | 34 | 66 |
| | Peoria or St. Louis | 37 | 63 |
| 5. E-2 and W-5.. | Chicago, Mackinaw City, or Kewaunee | 39 | 61 |
| | Peoria | 42 | 58 |
| | St. Louis | 42 | 58 |

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SECTION III

| Between— | Dividing points | Percentages | |
|---|---|---|---|
| | | East | West |
| 1. E-3 and W-1.. | Chicago, Mackinaw City, or Kewaunee | 22 | 78 |
| | Peoria | 24 | 76 |
| | St. Louis | 25 | 75 |
| 2. E-3 and W-2.. | Chicago, Mackinaw City, or Kewaunee | 24 | 76 |
| | Peoria | 26 | 74 |
| | St. Louis | 27 | 73 |
| 3. E-3 and W-3.. | Chicago, Mackinaw City, or Kewaunee | 24 | 76 |
| | Peoria | 29 | 71 |
| | St. Louis | 32 | 68 |
| 4. E-3 and W-4.. | Chicago, Mackinaw City, or Kewaunee | 28 | 72 |
| | Peoria | 31 | 69 |
| | St. Louis | 31 | 69 |
| 5. E-3 and W-5.. | Chicago, Mackinaw City, or Kewaunee | 32 | 68 |
| | Peoria | 35 | 65 |
| | St. Louis | 35 | 65 |

SECTION IV

| Between— | Dividing points | Percentages | |
|---|---|---|---|
| | | East | West |
| 1. E-4 and W-1.. | Chicago, Mackinaw City, or Kewaunee | 17 | 83 |
| | Peoria | 18 | 82 |
| | St. Louis | 19 | 81 |
| 2. E-4 and W-2.. | Chicago, Mackinaw City, or Kewaunee | 19 | 81 |
| | Peoria | 20 | 80 |
| | St. Louis | 21 | 79 |
| 3. E-4 and W-3.. | Chicago, Mackinaw City, or Kewaunee | 19 | 81 |
| | Peoria | 22 | 78 |
| | St. Louis | 25 | 75 |
| 4. E-4 and W-4.. | Chicago, Mackinaw City, or Kewaunee | 23 | 77 |
| | Peoria | 24 | 76 |
| | St. Louis | 26 | 74 |
| 5. E-4 and W-5.. | Chicago, Mackinaw City, or Kewaunee | 25 | 75 |
| | Peoria | 26 | 74 |
| | St. Louis | 28 | 72 |

| Between— | Dividing points | Percentage | |
|---|---|---|---|
| | | East | West |
| 1. E-5 and W-1 | Chicago, Peoria or St. Louis | 15 | 85 |
| 2. E-5 and W-2 | Chicago, Peoria or St. Louis | 15 | 85 |
| 3. E-5 and W-3 | Chicago, Peoria or St. Louis | 17 | 83 |
| 4. E-5 and W-4 | Chicago, Peoria or St. Louis | 19 | 81 |
| 5. E-5 and W-5 | Chicago, Peoria or St. Louis | 21 | 79 |

SECTION VI

*Notes*

(*a*) The divisions prescribed in section V shall not apply on shipments to or from points on the lines of eastern, southern, or western railroads in group E-5 when such railroads perform service both east and west of the Mississippi River, but in lieu thereof the divisions prescribed in appendix C-1 shall apply.

(*b*) The divisions prescribed for groups W-4 and W-5 shall apply only over routes through northern gateways, viz., Duluth, Minneapolis, Minnesota Transfer, and St. Paul, Minn., and Superior, Wis.

(*c*) Nothing in this report and order shall be interpreted as prescribing divisions of rates to and from points on the Durham and Winston-Salem districts of the Norfolk and Western Railway Company.

(*d*) Nothing in this report and order shall be interpreted as prescribing divisions for terminal switching service at a point of origin or destination on traffic which is interchanged thereat between a complainant and a defendant.

(*e*) When intermediate switching service of the Terminal Railroad Association of St. Louis, the Alton and South-

ern Railroad, the Illinois Terminal Railroad Company, or motor carrier service is necessary to effect interchange at St. Louis or East St. Louis, the applicable charges for such service shall be payable from the eastern primary division on westbound shipments and from the western primary division on eastbound shipments.

Nothing in this report and order shall be interpreted as prescribing a division for service between East St. Louis and St. Louis on traffic which originates or terminates in the St. Louis-East St. Louis district and is interchanged therein between a complainant and a defendant.

(*f*) Nothing in this report and order shall be interpreted as having any effect on special arrangements between a complainant and a defendant relating to intermediate service required for interchange at points other than St. Louis-East St. Louis.

(*g*) Divisions of rates over cross-lake routes via Milwaukee and Manitowoc, Wis., and Menominee and Manistique, Mich., shall be the same as those prescribed via Kewaunee.

525 APPENDIX C-1

*Intraterritorial divisions and interterritorial subdivisions prescribed*

| Scales of Divisional Factors | | | | | | | |
|---|---|---|---|---|---|---|---|
| Miles | 1 | 2 | 3 | Miles | 1 | 2 | 3 |
| 50 | 65 | .... | 72 | 1,100 | 318 | 292 | 350 |
| 100 | 77 | .... | 85 | 1,150 | 330 | 304 | 363 |
| 150 | 89 | .... | 98 | 1,200 | 342 | 316 | 376 |
| 200 | 101 | 75 | 111 | 1,250 | 354 | 328 | 389 |
| 250 | 113 | 87 | 124 | 1,300 | 367 | 341 | 404 |
| 300 | 125 | 99 | 138 | 1,350 | 379 | 353 | 417 |
| 350 | 137 | 111 | 151 | 1,400 | 391 | 365 | 430 |
| 400 | 149 | 123 | 164 | 1,450 | 403 | ..... | 443 |
| 450 | 161 | 135 | 177 | 1,500 | 415 | ..... | 457 |
| 500 | 174 | 148 | 191 | 1,550 | 427 | ..... | 470 |
| 550 | 186 | 160 | 205 | 1,600 | 439 | ..... | 483 |
| 600 | 198 | 172 | 218 | 1,650 | 451 | ..... | 496 |
| 650 | 210 | 184 | 231 | 1,700 | 463 | ..... | 509 |
| 700 | 222 | 196 | 244 | 1,750 | 475 | ..... | 523 |
| 750 | 234 | 208 | 257 | 1,800 | 487 | ..... | 536 |
| 800 | 246 | 220 | 271 | 1,850 | 499 | ..... | 549 |
| 850 | 258 | 232 | 284 | 1,900 | 511 | ..... | 562 |
| 900 | 270 | 244 | 297 | 1,950 | 523 | ..... | 575 |
| 950 | 282 | 256 | 310 | 2,000 | 535 | ..... | 589 |
| 1,000 | 294 | 268 | 323 | 2,050 | 547 | ..... | 602 |
| 1,050 | 306 | 280 | 337 | 2,100 | 599 | ..... | 615 |

Definitions

Mountain-Pacific territory includes the States of Arizona, California, Washington, Oregon, Idaho, Montana, Nevada, Utah, New Mexico (except that portion which is east of the line of the AT&SF between Raton, N. Mex., and El Paso, Tex.), Colorado (except that portion which is east of the Colorado & Southern and paralleling railroads between Cheyenne, Wyo., and Trinidad, Colo.), and Wyoming (except that portion which is east of Gillette, Casper and Cheyenne).

Midwestern territory includes all territory between mountain-Pacific territory and official or southern territory, and also points in Indiana in the Chicago switching district.

The "border" of any territory refers to the points through which a shipment moves. When a shipment moves over lines of railroad which constitute the border of mountain-Pacific territory, the point of interchange shall be considered the border point.

PRESCRIBED DIVISIONS

(*a*) Primary divisions of intraterritorial rates shall be percentages determined by use of the scales of prorating factors hereinabove set forth.

(*b*) The factor for the haul in mountain-Pacific territory shall be that shown in column 3 for the short-
526 line distance between the point of origin or destination in transcontinental territory (including Montana) and the border between mountain-Pacific and midwestern territories. The factor for the haul in midwestern territory shall be that shown in column 1 for the short-line distance between the point of origin or destination in midwestern territory and the border between that territory and mountain-Pacific territory.

(*c*) When a shipment is interchanged between a complainant in Sub-Nos. 1, 2, and 3 and a defendant therein at a point within midwestern territory, the primary division for the haul in such territory determined as provided in paragraph (*b*) shall be subdivided as follows: The factor for the haul which includes origin or destination terminal service in midwestern territory shall be that shown in column 1 for the short-line distance between the point of origin or destination and the point of interchange, and the factor for the intermediate haul shall be that shown in

column 2 for the short-line distance between the point of interchange and the border of mountain-Pacific territory.

(*d*) Subdivisions of western primary divisions of interterritorial rates between official and transcontinental territories prescribed in appendix B-1 shall be determined as follows: The factor for the haul in mountain-Pacific territory shall be that shown in column 3 for the short-line distance between the point of origin or destination in transcontinental territory (including Montana) and the border between mountain-Pacific territory and midwestern territory, and the factor for the haul in midwestern territory shall be that shown in column 2 for the short-line distance between the aforesaid border and the border of official territory. On an interterritorial shipment interchanged between a complainant in Sub-Nos. 1, 2, and 3 and a defendant therein at a point within midwestern territory the intermediate subdivision determined as provided in the next-preceding sentence shall be further subdivided by applying to the respective hauls the factors shown in column 2 for the short-line distances between the territorial borders and the point of interchange within midwestern territory.

(*e*) In no case shall a primary division be less than 15 percent, and in disposing of fractions of 1 percent the odd 1 percent should be added to the percentage which contains the larger decimal or, if the percentages contain equal decimals, 1 percent should be added to the odd-numbered percentage, provided, however, that if the parties so agree, percentages including decimal fractions may be established.

(*f*) The parties may, if they so agree, establish percentages other than those determined as herein provided for the purpose of grouping or of equalizing competing routes or gateways.

NOTES

(*a*) The prescribed divisions shall not apply on traffic interchanged at Chicago by The Atchinson, Topeka and Santa Fe Railway Company and the Chicago and North Western Railway Company subject to special divisions heretofore agreed upon by those companies.

(*b*) The prescribed divisions shall not apply on traffic which is reconsigned or is subject to transit arrangements involving unusual out-of-line or back-haul service and is now subject to special divisions, referred to in exhibit MW-140, appendix E, as amended.

527 (*c*) The prescribed divisions shall not apply on traffic subject to joint rates in which The Texas and Pacific Railway Company (including its subsidiaries) and cross-complainants in No. 31503 (Sub-No. 1) solely participate.

(*d*) The prescribed divisions of rates to and from points in Montana shall apply only over routes via Duluth, Minneapolis, Minnesota Transfer, St. Paul, Minn., or Superior, Wis.

(*e*) The prescribed divisions shall not apply on traffic which originates or terminates at points in North Dakota or at points in Minnesota excluded from the definition of Midwestern territory in appendix D to the complaint in No. 31503 (Sub-No. 1).

| Item (1) | Official—Mountain Pacific traffic: Official (2) | Midwest (3) | Mountain Pacific (4) | Total (5) | Midwest—Mountain Pacific traffic: Midwest (6) | Mountain Pacific (7) | Total (8) |
|---|---|---|---|---|---|---|---|
| Defendants' costs [1] | $3,619,872 | $2,646,074 | $8,916,391 | $15,182,337 | $2,929,720 | $7,576,989 | $10,506,709 |
| *Restatement—six adjustments:* | | | | | | | |
| Way and structures—running [2] | + 112,190 | + 433,226 | + 370,687 | + 916,103 | + 368,607 | + 259,727 | + 628,334 |
| Locomotive costs [2] | — 31,292 | — 30,978 | — 364,730 | — 427,000 | — 73,848 | — 339,549 | — 413,397 |
| Car costs [2] | + 137,963 | + 18,887 | — 5,819 | + 113,257 | — 13,914 | — 14,831 | — 28,745 |
| Solely related [3] | ..... | ..... | — 30,800 | — 30,800 | ..... | — 19,843 | — 19,843 |
| Freight car empty return [4] | — 312,565 | + 159,670 | — 112,633 | — 359,602 | + 183,139 | + 59,447 | + 242,586 |
| Return on capital [4] | — 317,536 | — 274,087 | — 811,151 | —1,402,774 | — 272,561 | — 734,603 | —1,007,164 |
| Six adjustments—net | + 213,890 | + 268,944 | — 954,446 | — 471,612 | + 191,423 | — 789,652 | — 598,229 |
| *Restatement* | 3,833,762 | 2,915,018 | 7,961,945 | 14,710,725 | 3,121,143 | 6,787,337 | 9,908,480 |
| Defendants' remaining adjustments (net) [5] | + 306,036 | + 153,732 | + 144,617 | + 604,385 | + 102,160 | + 142,100 | + 244,260 |
| *Rail Form A* [6] | 4,065,965 | 3,100,293 | 8,052,875 | 15,219,133 | 3,208,419 | 6,897,880 | 10,106,299 |

[1] Source: Transcontinental exhibit T-791 and Midwest exhibit MW-768.

[2] These three adjustments as shown by Midwestern lines' exhibit MW-768.

[3] The solely related adjustment was computed on the basis of the percentages shown in exhibit T-632. This gives consideration to the fact that the other adjustments include a portion of total solely related.

[4] These adjustments are based on exhibit MW-773, changed from a cost territory (code "X") basis to a revenue group (code "Z") basis. The lapover of Mountain Pacific roads into Midwest territory was the difference between the Mountain Pacific service on the revenue group basis and on the cost territory basis. The lapover between Midwest and Official was computed by the same method. Lapover was associated with thru train service, computed to be 36.56739 percent of Midwest made by Mountain Pacific trains and 2.27311 percent of Official made by Midwest trains. Sources: MW-768, T-632, and Tr. 10,399.

[5] The adjustments as shown by Midwestern lines' exhibit MW-768, other than adjustments on lines 2, 3, 4, and 5.

[6] Rail Form A costs are based on defendants' costs reflecting a corrected car-mile count in the Midwest and excluding special services as shown on exhibit MW-768. If they were based on the defendants' costs shown on exhibit T-791 and corresponding costs on Exhibit MW-768, they would be line 1 above plus or minus lines 8 and 10, or for Official-Mountain Pacific traffic: Official $4,139,798, Midwest $3,068,759, Mountain Pacific $8,106,562, total $15,315,110; and for Midwest-Mountain Pacific traffic: Midwest $3,223,303, Mountain Pacific $6,929,437, total $10,152,740.

**Order**

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 31st day of December, A.D. 1963.

No. 31503

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

No. 31503 (Sub-No. 1)

AHNAPEE & WESTERN RAILWAY COMPANY ET AL.

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 31503 (Sub-No. 2)

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 31503 (Sub-No. 3)

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

v.

SAME

No. 31503 (Sub-No. 4)

LOUISVILLE & NASHVILLE RAILROAD COMPANY

v.

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

No. 31503 (Sub-No. 5)

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY

v.

SAME

The Commission having on the date hereof made and filed its supplemental report containing its findings of

fact and conclusions thereon, which said report and the report of March 21, 1963, are hereby referred to and made a part hereof:

*It is ordered,* That the petitions for reconsideration or modification of the report and order of March 21, 1963, and of the order of June 20, 1963, in the above-entitled proceedings, filed by the mountain-Pacific rail carriers, the midwestern complainants, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Wabash Railroad Company, the Missouri-Kansas-Texas Railroad Company, the St. Louis-San Francisco Railway Company, and the interveners, California Public Utilities Commission and other mountain-Pacific State Commissions be, and they are hereby denied, except insofar as the said report and order are modified herein;

*It is further ordered,* That the petition of the Missouri-Kansas-Texas Railroad Company and the St. Louis-San Francisco Railway Company for leave to file a petition for further hearing be, and it hereby granted, and that the petition for further hearing so tendered be, and it is hereby, denied;

*It is further ordered,* (1) That the complainants and the defendants in No. 31503 and No. 31503 (Sub-Nos. 1, 4, and 5), according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before March 30, 1964, and thereafter to apply, divisions of joint all-rail interstate rates for the transportation of property between points in official or eastern territory on the one hand, and on the other, points in transcontinental territory (including Montana), determined as provided in Appendix B-1, and (2) that the complainants and the defendants in No. 31503 (Sub-Nos. 1, 2, and 3) according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before March 30, 1964, and thereafter to apply divisions of joint all-rail interstate rates for the

transportation of property between points in midwestern territory, on the one hand, and on the other, points in transcontinental territory (including Montana) and subdivisions of primary divisions of joint rates between official or eastern territory and transcontinental territory (including Montana) prescribed in the next preceding paragraph determined as provided in Appendix C-1, and (3) that the order of March 21, 1963, shall remain in full force and effect and shall expire upon compliance by the parties with (1) and (2) hereof.

*It is further ordered,* That the said complainants and defendants be, and they are hereby, notified and required to cease and desist, on or before March 30, 1964, and thereafter to abstain, from asking, demanding, collecting or receiving divisions (or subdivisions) of said joint rates upon bases other than those hereby prescribed;

*And it is further ordered,* That this order shall continue in force until the further order of the Commission.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION
Washington 25, D. C.

February 4, 1964

No. 31503[1]

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

NOTICE TO THE PARTIES:

On January 22, 1964, copies of the Supplemental Report and Order of the Commission, filed and entered December 31, 1963, were served upon interested parties. Through inadvertence, certain errors were made on sheet 1, Appendix B-1 and sheet 9, Appendix C-1, which should be corrected as follows:

The description of group E-5 in Appendix B-1 (sheet 1 of appendices) is corrected to read as follows:

> E-5, points on southern, western or eastern railroads in Illinois south and east of the line of the Atchison, Topeka & Santa Fe between Chicago and Peoria and the line of the Gulf, Mobile & Ohio between Peoria and East St. Louis, and also Evansville, Vincennes, and Terre Haute, Ind.

---

[1] This notice embraces also No. 31503 (Sub-No. 1), Ahnapee & Western Railway Company et al. v. Abilene & Southern Railway Company et al.; No. 31503 (Sub-No. 2), Chicago, Burlington & Quincy Railroad Company et al v. Abilene & Southern Railway Company et al.; No. 31503 (Sub-No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Same; No. 31503 (Sub-No. 4), Louisville & Nashville Railroad Company v. Akron, Canton & Youngstown Railroad Company et al.; and No. 31503 (Sub-No. 5), Cincinnati, New Orleans & Texas Pacific Railway Company v. Same.

The first paragraph on sheet 9 of appendices (Appendix C-1) is corrected to read as follows:

> Midwestern territory includes all territory between mountain-Pacific territory and official or southern territory and includes also points in Indiana in the Chicago switching district and stations on the line of the Elgin, Joliet and Eastern Railway Company in Indiana.

HAROLD D. McCOY
Secretary

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## APPENDIX D

A. Section 1(4) of the Interstate Commerce Act, 49 U.S.C. § 1(4), provides:

> (4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 15(6) of the Interstate Commerce Act, 49 U.S.C. § 15(6), provides:

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

B. Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b), provides:

(b) SUBMITTALS AND DECISION.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate

officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e), provides:

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

## APPENDIX E

### List of Appellants

The Baltimore and Ohio Railroad Company
Boston and Maine Corporation
The Chesapeake and Ohio Railroad Company
Chicago & Eastern Illinois Railroad Company
Erie-Lackawanna Railroad Company
Lehigh Valley Railroad Company
The New York Central Railroad Company
The New York, New Haven and Hartford Railroad Company (Richard Joyce Smith, William J. Kirk, Harry W. Dorigan, Trustees)
Norfolk and Western Railway Company
The Pennsylvania Railroad Company
Reading Company
Wabash Railroad Company (Norfolk and Western Railway Company, Lessee)
The Akron, Canton & Youngstown Railroad Company
The Ann Arbor Railroad Company
Aroostock Valley Railroad Company
Bangor and Aroostock Railroad Company
Bessemer and Lake Erie Railroad Company
The Central Railroad of New Jersey
Central Vermont Railway, Inc.
Chicago South Shore and South Bend Railroad
The Delaware and Hudson Corporation
The Detroit and Toledo Shore Line Railroad Company
Detroit, Toledo and Ironton Railroad Company
Grand Trunk Western Railroad Company
The Lehigh and Hudson River Railway Company
The Long Island Rail Road Company
Maine Central Railroad Company
Monon Railroad
New York, Susquehanna and Western Railroad Company
Northampton and Bath Railroad Company

Pennsylvania-Reading Seashore Lines
Pittsburgh & Lake Erie Railroad Company
The Pittsburgh & West Virginia Railway Company (Norfolk and Western Railway Company, Lessee)
Richmond, Fredericksburg and Potomac Railroad Company
St. Johnbury & Lamoille County Railroad
The Staten Island Rapid Transit Railway Company
Wellsville, Addison & Galeton Railroad Corporation
Western Maryland Railway Company

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JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

**Nos. 143, 159 and 576**
**OCTOBER TERM, 1965**

---

**No. 143**

**THE BALTIMORE AND OHIO RY. CO., et al.,**
**v.** **Appellants,**
**THE ATCHISON, TOPEKA AND SANTA FE RY. CO., et al.,**
**Appellees.**

---

**No. 159**

**CHICAGO AND NORTH WESTERN RY. CO., et al.,**
**v.** **Appellants,**
**THE ATCHISON, TOPEKA AND SANTA FE RY. CO., et al.,**
**Appellees.**

---

**No. 576**

**UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,**
**v.** **Appellants,**
**THE ATCHISON, TOPEKA AND SANTA FE RY. CO., et al.,**
**Appellees.**

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**On Appeal From the United States District Court for the Southern District of California**

---

## MOTION TO AFFIRM

---

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**Salem, Oregon 97310**

**Filed on behalf of Intervening Plaintiffs-Appellees, Regulatory Commissions of the States of:**
**Arizona**
**Colorado**
**Idaho**
**Montana**
**Nevada**
**New Mexico**
**Oregon**
**Utah**
**Washington**

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Nos. 143, 159 and 576

# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 143

THE BALTIMORE AND OHIO R. CO., et al.,
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v.

THE ATCHISON, TOPEKA AND SANTA FE RY. CO., et al.,
Appellees.

No. 159

CHICAGO AND NORTH WESTERN RY. CO., et al.,
Appellants,

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THE ATCHISON, TOPEKA AND SANTA FE RY., CO., et al.,
Appellees.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RY. CO., et al.,
Appellees.

On Appeal From the United State District Court for the Southern District of California

## MOTION TO AFFIRM

Intervening Plaintiffs-Appellees, State regulatory Commissions, pursuant to Rule 16 of the Revised Rules

of the Supreme Court of the United States, move that the Judgment of the District Court be affirmed on the ground that the questions raised are so unsubstantial as not to warrant further argument because the Judgment of the District Court is plainly correct.

## STATEMENT

Intervening Plaintiff-Appellees are the regulatory commissions of the states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington are charged by statute of their respective states with the power and duty of administering state laws regulating carriers by railroad. These regulatory commissions are further authorized by statute to appear and represent their respective States before the Interstate Commerce Commission.

The Mountain-Pacific states have experienced a tremendous population and industrial expansion in the period since World War II. In large part, however, the economy of the Mountain-Pacific States is tied to the production of agricultural commodities, forest production and products of mines which have been and for the future must be marketed in substantial volume in the Midwest and East. The economy of the Mountain-Pacific States is dependent upon the availability and enlargement of rail transportation service at realistic competitive prices. Therefore, the people of the Mountain-Pacific States are vitally concerned with the divisions orders of the Commission under review. These orders would seriously hamper the ability of the Mountain-Pacific rail-

roads to provide for the present and future transportation needs of this expanding territory.

## ARGUMENT

### I.

In setting aside the orders of the Commission, the district court recognized the interest of these Intervening Plaintiff Appellees and quite properly held that the Commission had failed to accord these interests the statutory protection to which they were entitled. Specifically, the court condemned the Commission's treatment of the passenger deficit issue which was central to our position and ordered the Commission to consider the revenue needs of the carriers for *all* transportation services, including needs represented by passenger deficits in any proceeding upon remand. To our view, this is the most important point of the district court's decision. Yet neither the Commission nor the Midwestern railroads, who are now the only applicants in this case, even mention this part of the district court's holding. As will be shown below, this fact in itself establishes that plenary review in this case would not be warranted, for whatever view the Court might take of the other grounds for the district court's decision, the Commission's reliance upon passenger deficits would require that its orders be set aside. Hence, the district court's judgment must be affirmed.

Section 15(6) of the Interstate Commerce Act requires the Commission to consider among other standards the revenue needs of the railroads affected. In the proceedings before the Commission Intervening Plaintiff-Appellee introduced evidence showing the tremendous

need for investment in plant and equipment in order that the Mountain-Pacific railroads could provide the expanded railroad service required by the growing industry and agriculture of the West.

The basic revenue needs issue as it developed in these proceedings revolved about the need of Mountain-Pacific railroads for revenue necessary to meet their responsibility to provide adequate railway service for the people of the states they serve. The West has grown tremendously—both in population and industrially. Metallurgical industries and natural resource production of electricity, natural gas, and oil have experienced unusually high growth. An extremely important characteristic of this growth rate is that it has not been uniform, and many areas are still largely not industrialized. In other words, not only has the need for adequate railroad service been expanding, but the potential for increased development of the West in the future will call for huge additional investment by the railroads in order to keep pace and provide the necessary service.

Furthermore, the geographic location of the Mountain-Pacific states, far from all centers of population of the East and Midwest which are the country's principal markets, emphasizes the dependence of the Mountain-Pacific area on the railroads. Not only do the long distances require unusually high service levels, but it is clear that the ability of the expanding West to compete with eastern products depends in large part on the maintenance of competitive freight rates.

The West is thus in a unique position as far as its

transportation needs are concerned. During at least the last decade, Mountain-Pacific railroads increased their net investments by over a billion dollars. Yet the Mountain-Pacific area has suffered substantially from critical equipment shortages, and the earnings of the Mountain-Pacific railroads have declined.

The Commission did not challenge these facts. The Commission's report documents the greater growth of Mountain-Pacific territory (B&O J.S. 71a-72a). The report also acknowledges that the Mountain-Pacific (transcontinental) lines' income did not keep pace with their growth of traffic volume (B&O J.S. 74a-75a). The Commission's report thereafter refers to the evidence showing that, the Mountain-Pacific lines increased "their net investment in transportation property by $800 million . . . but this increase in investment produced not one penny of earnings." (B&O J.S. 87a). This showing and others like it are passed off by the Commission as resulting "from the passenger deficits of those roads" (B&O J.S. 86a-88a),

This so-called "passenger deficit" issue was not raised by the Eastern and Midwestern railroads. No claim was made at the hearings by any party that the passenger deficits of the Mountain-Pacific railroads were too high. The issue was invented by the Commission's Examiners who relied on the passenger deficit theory to reject the Mountain-Pacific lines' revenue needs evidence. The Examiners also criticized the State regulatory commissions for not taking a "sympathetic attitude" toward passenger train discontinuances (Examiners' report p. 31). The

Commission dropped the language criticizing the state commissions, but adopted the Examiners' passenger deficit theory, in the same language used by its Examiners (Compare B&O J.S. 86a-88a with Examiners' report pp. 28-31).

Using this theory, the Commission concluded that "the eastern railroads are in a less advantageous situation *as freight carriers* than those in the western district" (B&O J.S. 88a). In other words, the Commission relied upon the freight net railway operating income, as contrasted with the entire income, including the passenger deficits of the Mountain-Pacific railroads. It was on the basis of such comparisons that the Commission reached the conclusion that the divisions of the Eastern and Midwestern railroads should be increased to reflect their allegedly greater revenue need (see also B&O J.S. 141a, 143a).

This disregard of passenger deficits was one of the major reasons why the District Court set aside the Order of the Commission. In remanding the case, the District Court specifically directed the Commission to consider "the revenue needs of the carriers for *all* transportation services, including needs represented by passenger deficits." (B&O J.S. 20a), This disposition of the case by the District Court was plainly correct.

Section 15(6) does not contemplate any separation of revenue needs as between freight and passenger operations. The section refes to the "'amount of revenue required" with respect to operations "in the service of transportation." With respect to revenue needs as con-

trasted with the costs of the particular traffic in issue, the statutory language covers "all transportation service." *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 360 (1936).

The Commission's action in this divisions case cannot be reconciled with its action with respect to the revenue needs of the railroads in freight rate increase cases. This Court approved the Commission's inclusion of passenger deficits in determining revenue needs in *King* v. *United States,* 344 U.S. 254 (1952). The *King* opinion includes the following (344 U.S. at 262-63):

" 'Citing with approval its similar views in *Ex Parte No. 103, Fifteen Per Cent Case,* 1931, 178 I.C.C. 539, and *Ex Parte No. 123, Fifteen Per Cent Case,* 1937-1938, 226 I.C.C. 41, the Commission summarizes its present position as follows:

> "These cases are typical of our more recent holdings upon this question. While we regard it as 'trite to say that each particular service, coach, sleeper, parlor car, and head end, should be as nearly as may be pay its own way and return a profit' (*Eastern Pasenger Fares in Catches,* 227 I.C.C. 17, 25), and we have accepted the contention that there may be traffic that should not be burdened with a shortage of passenger service return (*Livestock, Western District Rates,* 190 I.C.C. 611, 629), yet, if passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, we have felt compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges. Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations. Both

> may be subjected to reasonable rates and charges to produce the fair aggregate return, even though thereby a higher rate of return may be expected from the one than from the other. (*Property Owners' Committee* v. *Chesapeake & O. Ry. Co.*, 237 I.C.C. 549, 565.)' *Id.*, at 35. See also, *Ex Parte 87, Revenues in Western District*, 113 I.C.C. 3, 23."

"This change of policy was the inevitable consequence of steadily increasing passenger operating costs, together with the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficits by increasing passenger rates."

The *King* case upheld an I.C.C. order requiring an increase in intrastate freight rates. This same basis of using revenue needs from all services, including passenger service, has been used by the Interstate Commerce Commission many times to order increases in interstate freight rates in the Mountain-Pacific states. It would constitute a denial of equal justice to depart from the basis of revenue needs used to increase intrastate and interstate freight rates in order, in this divisions case, to take revenues away from the railroads serving the Mountain-Pacific states.

Whether or not the I.C.C. has the power to base its actions in rate and divisions cases on inconsistent theories of revenue needs, the Commission's action here was not supported by findings explaining the reasons or basis for its actions, in violation of Section 8(b) of the Administrative Procedure Act. The need for rational findings is especially great in a case in which the Commission

has departed from "prior forms." *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-53 (1954).

In addition to the error arising from lack of adequate findings, the Commission's reliance upon freight net railway operating income data to measure the relative needs of railroads "as freight carriers" is arbitrary and unlawful because such data do not provide a rational comparison of financial results of freight operations on different railroads. Freight net income figures do not indicate the condition of the railroad were it to discontinue passenger service. This is because freight net income figures and passenger deficits involve a substantial amount of joint expenses for the maintenance of, for example, track, roadbed, bridges, and the like, over which freight and passenger trains operate. These joint expenses, which must be incurred regardless of whether or not the railroad operates passenger service, are allocated to freight or passenger expense according to an I.C.C. formula based on the amount of each service the railroad provides. Thus, were a railroad to eliminate passenger service, the joint costs allocated to it would have to be transferred to the freight accounts, thus reducing rather than improving freight operating statistics. As this Court held in *King* v. *United States*, 344 U.S. 254, 265, (1952), "the discontinuance of railroad passenger service would not permit the discontinuance of high-speed tracks and equipment because of the need for fast freight schedules." In other words, the freight and passenger portions of a railroad business are not separate and distinct operations, and the Commission's insistence on disregarding passen-

ger deficits was arbitrary action which was properly set aside by the District Court.

*II.*

Under its unlawful passenger deficit theory, the Commission concluded that the revenue needs of the Eastern and Midwestern lines were greater than those of the Mountain-Pacific lines, and that therefore the divisional share of the East and Midwest should be increased. Yet, even under its own theory, the Commission made no findings whatsoever as to what the revenue needs of the East and Midwest are, nor did it determine whether or not the new divisional order would compensate for those needs. This flagrant violation of the Administrative Procedure Act was a primary factor responsible for the District Court's refusal to enforce the order of the Commission. The Court concluded:

> [T]hat to comply with the provisions of the Interstate Commerce and Administrative Procedure Acts, . . . [15(6) and 8(b) respectively] findings must be made as to the amount of revenue, in terms of dollars, required by the respective carriers affected in any new divisions prescribed, [and] the financial effect of the Commission's orders in terms of dollars as to the carriers and the extent by which the new divisions prescribed will produce the revenue found to be required . . . (B&O J.S. 19a-20a).

The holding of the District Court is in complete conformity with the interpretation given the Administrative Procedure Act in this Court. In *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-68 (1962), the Court emphasized the responsibility of the Commission to set

forth explicit findings of fact and conclusions so that it is possible to determine the reasons and basis upon which the Commission's decision is predicated. The Court described the Commission's action in *Burlington* as follows:

> There are no findings and no analysis to justify the choice made, no indication of the bases on which the Commission exercised its expert discretion, We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. . . . Expert discretion is the life-blood of the administrative process, "but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can be a monster which rules with no practical limits on its discretion."

This ruling is clearly applicable to the Commission's action in the present case. As the District Court held (B&O J.S. 12a), where the issue before the Commission is the amount of revenue which a carrier should get from one part of its business in order to ensure a just contribution to its overall revenue needs, a prerequisite to a rational decision is a determination as to the amount of the overall needs and the amount of the transfer that should be made to meet those needs. To decide without knowing either what is needed or what its order will accomplish is arbitrary action in its grossest form. To act without findings from which a reviewing court may judge the reasonableness of a chosen course compounds the error. The whole purpose of the Administrative Procedure Act was to preclude just such arbitrary decisions on the part of administrative agencies.

The Jurisdictional Statement of the United States and the Interstate Commerce Commission gives the mislead-

ing impression that the question is whether the Commission must make findings for "each of the 300 railroads involved" (U.S. J.S. 2) as to "precise difference in dollars" resulting from the new divisions (U.S. J.S. 18). Even as to individual carriers this statement of the question is misleading. No question is presented by the instant case as to any requirement of findings with respect to "each of the 300 railroads involved", the district court having expressly stated that, except as to three railroads, any question as to individual consideration had been waived. (B. & O.J.S. 19a).

This is not a fair statement of the question in this case. The Commission made no finding as to the amount of revenue required by the respective *groups* of railroads, nor did it find, in any form (precise or otherwise) what effect its order would have upon the revenue needs of those *groups*. This is irrational and unlawful action condemned by the Administrative Procedure Act, quite apart from any consideration of any individual roads.

From the standpoint of these Intervening Plaintiff-Appellees, the absence of group findings is critical. As representatives of the public interest, our concern is with the whole railroad system necessary to serve our area, not at this time with the financial condition, as such of any single railroad. Of course, the West does depend upon all of its railroads, and could ill afford to lose the services of any one of them. But the basic problem raised by the Commission's orders here goes to their financial impact upon the whole Mountain-Pacific group. Because the Commission's findings as to the group are inadequate, the situation of individual railroads is irrelevant.

## CONCLUSION

For the foregoing reasons, no substantial questions for the decision of the Court are presented in these appeals, and the judgment of the District Court should be affirmed without argument.

Respectfully submitted,

MILTON J, HUSKY, Chairman
Arizona Corporation Commission

HENRY E. ZARLENGO, Chairman
Public Utilities Commission
of Colorado

RALPH H. WICKBERG, Chairman
Public Utilities Commision
of Idaho

PAUL T. SMITH, Chairman
Board of Railroad Commissioners
of Montana

J. G. ALLARD, Chairman
Public Service Commission
of Nevada

MURRY E. MORGAN, Chairman
State Corporation Commission
of New Mexico

JOHN J. O'CONNELL, Attorney General
and
FRANK P. HAYES, Assistant
Attorney General

Washington Utilities and
Transportation Commission

DONALD HACKING, Chairman
Public Service Commision
of Utah

ROBERT Y. THORNTON
Attorney General of Oregon

LLOYD G. HAMMEL
Asistant Attorney General
Chief Counsel, Oregon PUC

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RICHARD W. SABIN
Asistant Attorney General of Oregon
Of Counsel for Intervening Plaintiffs-Appellees
103 Public Service Building
Salem, Oregon 97310

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

THE BALTIMORE AND OHIO R. CO., *et al.*, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*. } No. 143

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*. } No. 576

**On Appeal From the United States District Court for the Southern District of California**

## MEMORANDUM ON BEHALF OF APPELLEES SOUTHERN PACIFIC COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND OTHERS SUGGESTING THAT THE CAUSE IN NO. 143 IS MOOT AND THAT THE CAUSE IN NO. 576 IS PARTIALLY MOOT.

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*Attorneys for above Appellees*

February 15, 1966

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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THE BALTIMORE AND OHIO R. CO., *et al.*, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*. } No. 143

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*. } No. 576

---

**On Appeal From the United States District Court for the Southern District of California**

---

## MEMORANDUM ON BEHALF OF APPELLEES SOUTHERN PACIFIC COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND OTHERS SUGGESTING THAT THE CAUSE IN NO. 143 IS MOOT AND THAT THE CAUSE IN NO. 576 IS PARTIALLY MOOT.

---

Appellees Southern Pacific Company, The Denver and Rio Grande Western Railroad Company and other plaintiffs and intervener plaintiffs in the court below as listed in Appendix A file this Memorandum to advise the Court of facts occurring since the taking of these appeals, which render the appeal in No. 143 completely moot and the appeal in No. 576 partially moot,

thus wholly or partially depriving this Court of jurisdiction to hear these appeals.

These cases, together with No. 159, are appeals (by eastern railroads in No. 143, and by the United States and the Interstate Commerce Commission in No. 576) from the final judgment of a three-judge Federal District Court for the Southern District of California, on suit of mountain-Pacific railroads, including these Appellees, setting aside orders of the Interstate Commerce Commission which prescribed new divisions of joint rail rates on transcontinental freight traffic. The Commission prescribed new divisions of joint rates on eastern and mountain-Pacific transcontinental freight traffic substantially more favorable to the eastern lines than the existing divisions. New divisions were also established on transcontinental traffic originating and terminating in midwest territory and for midwestern lines participation as intermediate carriers of traffic moving between eastern (official) and mountain-Pacific territory. These divisions benefited the great majority of the midwestern lines, and nine of them have appealed in No. 159 from the setting aside of the Commission's order insofar as it relates to their divisions. The appeal of the eastern railroads in No. 143 is from the setting aside of the Commission's order insofar as it affects their divisions, and the appeal of the United States and the Interstate Commerce Commission is from the setting aside of the entire order relating to both eastern and midwestern railroad divisions.

The changes in divisions prescribed by the Commission would have become effective on July 1, 1963, but the District Court entered interlocutory injunctions restraining the operation of the Commission's orders subject to conditions protecting the interests of the eastern and midwestern railroads in the event the

orders were ultimately upheld. Thereafter the District Court entered its judgment setting aside the Commission's orders and remanding the cause to the Commission for further proceedings, from which judgment these three appeals were taken to this Court.

After these appeals had been docketed in this Court all of the eastern railroad Appellants in No. 143 and the Appellees, including those on behalf of whom this Memorandum is filed, entered into a settlement agreement dated September 29, 1965,[1] copy of which is attached as Appendix B to the memorandum, suggesting mootness filed by the other Appellees. This agreement recited that the three appeals had been taken to this Court and that "the parties desire, so far as they can, to compromise, settle and dispose of such Docket 31503 litigation before the courts and the Commission, the divisions dispute involved therein, and certain related disputes." The agreement provides new divisions on transcontinental traffic, effective as of September 1, 1965, generally higher for the eastern railroads than those previously in existence but somewhat lower than those prescribed by the Commission. All parties waived any right to retroactive payments under the conditions set forth in the interlocutory injunctions entered by the District Court.

Pursuant to the terms of the settlement agreement the eastern railroads and the Appellees, including those on behalf of whom this Memorandum is submitted, filed a joint petition before the Interstate Commerce Commission on October 20, 1965, attaching their settlement agreement and requesting that the Commission

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[1] Chicago & Eastern Illinois Railroad Company entered into a substantially similar agreement with the same Appellees on November 19, 1965, Appendix C to Memorandum suggesting mootness filed by other Appellees.

vacate its orders in Docket No. 31503 insofar as those orders prescribed divisions covered by that agreement. By order of January 7, 1966,[2] the Commission granted this petition and vacated its previous orders in all respects necessary to allow Appellees, including those on behalf of whom this Memorandum is filed, and the eastern railroad Appellants in No. 143, to continue in effect their agreement to apply divisions in lieu of those previously prescribed by the Commission.

The result is that the orders of the Commission, insofar as they relate to the divisions of the eastern railroads, which were the partial subject of the suit in the District Court, which are the complete subject of the appeal in No. 143 and which are the partial subject of the appeal in No. 576, are no longer in existence.

It is well settled that suits in the Federal courts involving orders of the Interstate Commerce Commission, or appeals therefrom, must be dismissed as moot for lack of jurisdiction when, through intervening action of the parties, of the legislature or of the Commission, the order under consideration has ceased to have any practical effect. This doctrine arises in part from the constitutional theory that federal judicial power extends only to actual "cases or controversies" and in part from the various statutory provisions limiting the jurisdiction of the Federal courts to review only actual orders of the Interstate Commerce Commission. *Cf. Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 132 (1939). Thus 28 U.S.C. § 1336 gives the District Courts "jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission;" 28 U.S.C. § 2325 requires that any interlocu-

[2] Attached as Appendix D to Memorandum filed by other Appellees suggesting mootness.

tory or permanent injunction restraining the operation of any "order of the Interstate Commerce Commission" shall be granted only by a three-judge federal district court; and 28 U.S.C. § 1253 gives the Supreme Court direct appeal jurisdiction from an order granting or denying an interlocutory or permanent injunction "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Good examples of cases where this Court has found mootness with respect to litigation involving orders of the Interstate Commerce Commission, where, because of intervening events, the order involved had ceased to have any practical effect, are the following: *United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920); *Minneapolis R.R.* v. *Peoria Ry.*, 270 U.S. 580 (1926); and *Atchison, Topeka & Santa Fe Ry.* v. *Dixie Carriers*, 355 U.S. 179 (1957). In the *Alaska Steamship* case, after the Commission had been enjoined from requiring rail and water carriers to use certain forms of bills of lading in domestic and export transportation, Congress passed an act requiring changes in both forms of bills of lading. In the *Minneapolis* case it was held the courts had no jurisdiction to enforce an order of the Commission, where the Commission had subsequently issued an order dismissing, without reservation, the complaint upon which the earlier order was completely based, since the subsequent order was found necessarily to have rescinded the former order. In the *Dixie Carriers* case, this Court found mootness, apparently because of a superseding Commission order, in an appeal from a District Court decision in *Dixie Carriers* v. *United States* (D.C.S.D. Tex., 1956), 114 F. 844, setting aside an earlier Commission order.

In the light of these precedents there is no doubt that the appeal in No. 143 has become completely

moot and that the appeal in No. 576, insofar as it relates to the divisions of the eastern railroads, has also become moot. Under such circumstances this Court has held that the established practice is to vacate the judgment below and remand with direction to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Wherefore, it is requested that this Court enter an order in No. 143 and in No. 576 vacating the judgment of the district court and remanding the cases to that court, with directions to dismiss the complaints as moot, insofar as the judgment below and the complaints are directed to portions of orders of the Interstate Commerce Commission which have been vacated by that Commission in its order dated January 7, 1966.

Respectfully submitted,

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*Attorneys for above Appellees*

February 15, 1966

## APPENDIX A

### List of Appellees on Whose Behalf This Memorandum Suggesting Mootness Is Filed

Amador Central Railroad Company
The Arcata and Mad River Rail Road Company
California Western Railroad
Camino, Placerville & Lake Tahoe Railroad Company
The Denver and Rio Grande Western Railroad Company
Holton Inter-Urban Railway
Inter-California Railway Company
Klamath Northern Railway Company
McCloud River Railway Company
Magma Arizona Railroad Company
Nacozari Rail Road Company
Northwestern Pacific Railroad Company
Pacific Electric Railway Company
Petaluma and Santa Rosa Railroad Company
San Diego & Arizona Eastern Railway Company
Santa Maria Valley Railway Company
Sierra Railroad Company
Southern Pacific Company
Tijuana and Tecate Railway Company
Trona Railway Company
Tucson, Cornelia and Gila Bend Railroad Company
Ventura County Railway Company
Visalia Electric Railroad Company
Yreka Western Railroad Company

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NOS. 143 AND 576

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

THE BALTIMORE AND OHIO R. CO., *et al.*, *Appellants*,
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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*. — No. 576

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

## MEMORANDUM SUGGESTING THAT THE CAUSE IN NO. 143 IS MOOT AND THAT THE CAUSE IN NO. 576 IS PARTIALLY MOOT

Appellees listed in Appendix A hereto file this memorandum to advise the Court of facts which render the cause in No. 143 wholly moot and the cause in No. 576 partially moot.

These cases, together with No. 159 also now pending in this Court, are appeals from a Judgment of the United States District Court for the Southern District of Cali-

fornia setting aside orders of the Interstate Commerce Commission in its Docket No. 31503 et al, dated March 21, 1963, and December 31, 1963. These Commission orders prescribed two new and separate bases for dividing joint rates on transcontinental freight traffic. One basis, set forth in Appendices B and B-1 of the Commission's orders, prescribed the divisions the railroads shall receive for services performed east and west of the primary dividing points (e.g., Chicago, Peoria, St. Louis). The other basis, set forth in Appendices C and C-1 of those orders, prescribed divisions as between western railroads for services performed within the West. The general effect of the new divisions would have been substantially to increase the revenues of the Eastern railroads and most of the Midwestern railroads at the expense of the Mountain-Pacific railroads.[1]

The prescribed changes in divisions would have become effective on July 1, 1963, but the district court entered interlocutory injunctions restraining the operation of the Commission's orders subject to conditions protecting the interests of the Eastern and Midwestern railroads in the event the orders were eventually upheld. Subsequently, the district court entered its judgment setting aside the Commission's orders and remanding the cause to the Commission for further proceedings. These appeals followed. No. 143 is an appeal by the Eastern railroads whose interests are affected by the judgment of the district court insofar as it set aside the parts of the Commission's orders increasing the divisions of railroads operating in the East. No. 159 is an appeal by Midwestern railroads whose in-

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[1] Two Midwestern railroads, the St. Louis-San Francisco Railway and the Missouri-Kansas-Texas Railroad, who would also have suffered revenue losses under the Commission's orders, aligned themselves with the Mountain-Pacific railroads.

terests are affected by the judgment of the district court insofar as it set aside the parts of the Commission's orders increasing the divisions of railroads operating in the Midwest. No. 576 is an appeal by the United States and the Interstate Commerce Commission challenging the district court's judgment in its entirety and defending the lawfulness of the increases ordered by the Commission for both the Eastern and the Midwestern railroads.

After these appeals were docketed in this Court, all railroad appellees and all of the Eastern railroad appellants in No. 143 became parties to agreements which completely disposed of the controversy between these parties.[2] The agreements provide new divisions on transcontinental traffic generally higher for the Eastern railroads than those previously in existence but somewhat lower than those prescribed by the Commission. Under the agreements, these new divisions became effective as of September 1, 1965, and all parties to the agreement expressly waived all rights which they may have for retroactive payments under the conditions set forth in the interlocutory injunctions entered by the district court.

On October 20, 1965, the Mountain-Pacific and Eastern railroads filed a joint petition before the Interstate Commerce Commission, attaching their settlement agreement and requesting that the Commission vacate its orders in Docket No. 31503 et al, insofar as those orders prescribed divisions covered by that agreement. By order of January

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[2] The principal agreement was reached between all appellee railroads and all Eastern railroads except the Chicago & Eastern Illinois Railroad Company on September 29, 1965. (This agreement is attached hereto as Appendix B.) An agreement substantially adopting the earlier agreement was made between the appellee railroads and the Chicago & Eastern Illinois on November 19, 1965. (This agreement is attached hereto as Appendix C.)

7, 1966, the Commission granted this petition and vacated its previous orders in the respects requested.[3]

By reason of the settlement agreement between the appellee railroads and the Eastern railroad appellants in No. 143, together with the order of the Commission dated January 7, 1966, vacating in part the Commission's orders which are the subject of the appeals in this Court, the controversy between the railroads which is the subject of the appeal in No. 143 is moot. For the same reason, a part of the controversy between the appellee railroads and the Government in No. 576 (the part relating to the lawfulness of the Commission's orders prescribing divisions as between appellant Eastern and appellee railroads) is also moot.

In *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), the Court stated:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss [citing numerous cases]. That was said in *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267, to be 'the duty of the appellate court.'"

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[3] The Commission's order of January 7, 1966, is attached hereto as Appendix D. That order vacates Appendices B and B-1 of the Commission's previous orders in all respects necessary to allow appellees and appellant Eastern railroads to continue in effect their agreement to apply divisions in lieu of those previously prescribed by the Commission. The order of vacation leaves the divisional percentages prescribed for the Eastern railroads in effect insofar as, and only insofar as, those percentages (1) apply to or from stations in Mountain-Pacific territory on the Chicago, Milwaukee, St. Paul & Pacific Railroad (a member of the Midwestern group of railroads) and (2) constitute a predicate for determination of the subdivisions to be received by railroads operating in the Midwest.

As illustrated in the cases collected by the Court in *Munsingwear,* the procedure to be followed where an action for judicial review of an administrative order has become moot is for this Court to enter an order vacating the judgment of the court below and remanding the case to that court with directions to dismiss the complaint as moot. *S.E.C.* v. *Philadelphia Co.,* 337 U.S. 901 (1949); *S.E.C.* v. *Long Island Lighting Co.,* 325 U.S. 833 (1945).

WHEREFORE, it is requested that this Court enter an order in Nos. 143 and 576 vacating the judgment of the district court and remanding the cases to that court, with directions to dismiss the complaints as moot, insofar as the judgment below and the complaints are directed to portions of orders of the Interstate Commerce Commission which have been vacated by that Commission in its order dated January 7, 1966.

Respectfully submitted,

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*Of Counsel*

February 15, 1966

## Appendix A

*List of Appellees on whose Behalf this Memorandum Suggesting Mootness is filed*

The Atchison, Topeka and Santa Fe Railway Company
Beaver, Meade and Englewood Railroad Company
Butte, Anaconda & Pacific Railway Company
Camas Prairie Railroad Company
Central California Traction Company
Colorado and Wyoming Railway Company
Great Northern Railway Company
Gulf, Colorado and Santa Fe Railway Company
Longview, Portland & Northern Railway Company
Los Angeles Junction Railway Company
Missouri-Kansas-Texas Railroad Company
Modesta and Empire Traction Company
Nevada Northern Railway Company
Northern Pacific Railway Company
Oregon, California & Eastern Railway Company
Oregon Electric Railway Company
Oregon Pacific and Eastern Railway Company
Oregon Trunk Railway
Pacific Coast R.R. Co.
Panhandle and Santa Fe Railway Company
Portland Traction Company
Quanah, Acme & Pacific Railway Company
Sacramento Northern Railway Company
Salt Lake, Garfield and Western Railway Company
Spokane International Railroad Company
Spokane, Portland and Seattle Railway Company
St. Louis-San Francisco Railway Company
Stockton Terminal and Eastern Railroad
Sunset Railway Company
Tidewater Southern Railway Company
Tooele Valley Railway Company
Union Pacific Railroad Company
Utah Railway Company
Walla Walla Valley Railway Company
The Western Pacific Railroad Company
Yakima Valley Transportation Co.

## Appendix B

## AGREEMENT

THIS AGREEMENT, made as of the 29th day of September, 1965, by and between the common carriers by railroad named in Appendix 1 attached hereto and made a part hereof, hereinafter referred to as Eastern parties, and the common carriers by railroad named in Appendix 2 attached hereto and made a part hereof, hereinafter referred to as Western parties,

**WITNESSETH:**

WHEREAS, the Eastern parties or their predecessors in interest and the Western parties and other Western railroads were variously complainants, defendants, cross-complainants or cross-defendants in proceedings before the Interstate Commerce Commission entitled Akron, Canton & Youngstown Railroad Company et al. v. Atchison, Topeka & Santa Fe Railway Company et al. No. 31503 et al., herein termed "Docket 31503 proceedings", which among others brought into issue the primary divisions of joint interterritorial rates on freight moving between stations on Eastern railroads in Official territory and stations on railroads in Mountain-Pacific territory (consisting of Transcontinental and Intermountain territories) and also stations in eastern New Mexico as more fully described in its initial report and order therein of March 21, 1963 (321 I.C.C. 17), its order of June 20, 1963, and its supplemental report and accompanying order of December 31, 1963 (322 I.C.C. 491);

WHEREAS, the Commission in said Docket 31503 proceedings prescribed, among others, primary divisions on traffic between Official Territory, on the one hand, and Transcontinental territory and Montana (part of Intermountain territory), on the other, in its order of March 21, 1963, made to become effective July 1, 1963, and in its order of December 31, 1963, made to become effective March 30, 1964;

WHEREAS, Western parties (and certain other western railroads) were plaintiffs or intervening plaintiffs in the action against the United States of America and the Interstate Commerce Commission as defendants in the United States District Court for the Southern District of California, Central Division, docketed as Civil Action No. 63-745 EC, to set aside, enjoin, annul, and suspend the orders of the Commission described above, in which action certain Eastern railroads and certain Midwestern railroads intervened as defendants, and wherein the said Court entered its judgments of interlocutory injunction on August 6, 1963, and March 24, 1964, respectively, enjoining pendente lite the said orders of the Commission subject to specified conditions, including conditions that if the Commission's orders were sustained they should be considered as effective on and after July 1, 1963, and March 30, 1964, respectively;

WHEREAS, the said District Court on February 17, 1965, made its judgment setting aside said orders and remanding the cause to the Commission for further proceedings, and contemporaneously made and entered its Order Staying Judgment for 60 days from said date, and, if within that period a notice or notices of appeal to the Supreme Court were filed, until final disposition or termination of such appeal or appeals; and providing that during said period or periods the judgments for interlocutory injunction shall continue in full force and effect;

WHEREAS, within the said 60-day period the intervening defendant Eastern railroads, the intervening defendant Midwestern railroads, and the United States of America and Interstate Commerce Commission as defendants before the District Court, filed their several notices of appeal to the Supreme Court of the United States, and thereafter docketed their several appeals in the Supreme Court where they are now pending as Nos. 143, 159, and 576, October Term, 1965, respectively;

AND WHEREAS, without awaiting the final outcome of the pending litigation, the parties desire, so far as they can, to compromise, settle, and dispose of such Docket 31503 litigation before the courts and the Commission, the divisions disputes involved therein, and certain related disputes, as between the parties to this agreement;

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

Section 1. This agreement applies (subject to exceptions in Section 3 hereof) to the division of all joint interterritorial freight rates, including those made by an aggregate-of-intermediate rule, between stations on lines of Eastern parties in Official territory, on the one hand, and stations in Mountain-Pacific territory and stations in eastern New Mexico other than those on the Texas-New Mexico Railway, on the other hand, in which the Western parties participate as either originating, terminating, or intermediate carriers, even though a portion of the line-haul service is rendered by a common carrier by railroad that is not a party to this agreement and has not concurred in the divisions provided herein. The Eastern parties shall have the right as against the Western parties to receive revenues based upon the primary divisions herein agreed to, regardless of the nonconcurrence of any Western railroad not party to this agreement.

Section 2. The divisions of the joint rates described in Section 1 hereof shall (subject to exceptions in Sections 3 and 4 hereof) be determined as follows:

(a) For traffic moving between points in Official territory, on the one hand, and points in Transcontinental territory and points in that part of Intermountain territory comprising points in Montana on and west of a line from

Havre, through Great Falls, Helena (including East Helena), and Butte, Montana, on the other hand, via Chicago group junctions; Peoria and Peoria group junctions; East St. Louis and East St. Louis group junctions (but not including St. Louis, Mo.); Kewaunee, Manitowoc, and Milwaukee, Wis., and Mackinaw City, Menonimee, and Manistique, Mich.; and other gateways grouped with one of the aforesaid gateways in TCFB Division Circular No. 62 series, there shall be six territorial groups in Official territory, as set forth in Appendix 3 hereto, and one Western group. The divisions shall be the group-to-group percents set forth in Appendix 4 hereto.

(b) For traffic between Official territory, on the one hand, and the balance of Intermountain territory and stations in eastern New Mexico other than those of the Texas-New Mexico Railway, on the other hand, the divisions shall be the point-to-point percentages set forth in Section 6 of WTL Division Sheet 500-A based on short line mileages east and west of the primary divisional gateways named in said division sheet except that on traffic to or from points in New England territory one and one-half percentage points shall be deducted from the western division and added to the eastern division.

Section 3. This agreement shall not apply to:

(a) Traffic which originates or terminates within the switching district of the dividing point and is there interchanged between an eastern carrier and a western carrier.

(b) Charges and arrangements relating to intermediate service in effecting interchange between an eastern carrier and a western carrier.

(c) Traffic which originates or terminates at points on the narrow gauge lines of the Denver & Rio Grande Western Railroad.

Section 4(a). Before the divisions set forth in Appendix 4 are applied to trailer-on-flat-car rates the terminal deductions provided by divisional agreements relating to such rates shall be deducted before prorating and added to the share of the railroad or railroads to which they accrue.

Section 4(b). Published arbitraries in rate tariffs which are added to the base rate to produce a through rate are to be first deducted before applying the divisions shown in Appendix 4 of this agreement. Such arbitraries are to accrue to the lines serving such arbitrary territory.

Section 5. The divisions herein provided shall be applied beginning with the shipments reported in the September 1965 interline accounts (subject to report in accordance with Freight Mandatory Accounting Rule 145 on October 18, 1965) and interline settlements on the basis thereof shall be made currently, without deferment or delay and in accordance with Freight Mandatory Accounting Rules, except that said divisions shall not apply on transited traffic which was waybilled out of its origin point prior to September 1, 1965.

Section 6(a). Except as the divisions established hereby are to become effective as provided in Section 5 hereof, the parties hereby agree that no retroactive effect will be given between themselves with respect to either the divisions established herein or any divisions which have been prescribed by the Commission in the Docket 31503 proceedings between the Eastern parties hereto and the Western parties. In this regard, the parties hereto specifically waive any and all rights which they may have for repayments by other parties hereto under the conditions set forth in paragraph 2 of the judgment for interlocutory injunction and the judgment for interlocutory injunction on supplemental complaint and on amended complaint, referred to in the order staying judgment entered by the United States

District Court, Southern District of California, Central Division, on February 18, 1965, in said No. 63-745 EC.

Section 6(b). All outstanding collateral divisions disputes (as described in Freight Mandatory Accounting Rule 174) between the eastern parties and the western parties relating to joint rates between the territories covered by this agreement shall be settled on a status quo basis, i.e., that the respective carriers keep all monies they have retained in their accounts and give up all claims they have against each other. As between the parties the six general outstanding disputes (listed in Appendix 5) between the eastern parties and the western parties are cancelled and all amounts due from any and all interim division agreements are cancelled.

Section 7. The parties hereto agree to cooperate in taking all appropriate steps before the Commission and the Courts to terminate as between themselves all litigation before the Commission and the Courts respecting the divisions involved in the Docket 31503 proceedings. To this end, the parties will first file a joint petition with the Commission asking it to vacate or modify its said orders in the Docket 31503 proceedings, insofar as they fix primary divisions between the parties hereto, so as to permit the parties to establish and maintain the primary divisions herein provided, and to dismiss all complaints and cross-complaints in such proceedings insofar as they relate to divisions between the parties hereto.

Section 8. Eastern parties will promptly prepare and submit to Western parties for joint publication a Division Sheet reflecting the basis of divisions herein provided.

Section 9. Eastern and Western railroads involved in the Docket 31503 proceedings may become parties hereto by executing a counterpart in the form set forth below, on or before October 31, 1965.

## COUNTERPART

....., a corporation organized and existing under the laws of ....., having received and being duly familiar with a counterpart of that certain agreement dated September 29 ,1965, between Eastern railroads and Western railroads relative to the divisions of joint interterritorial freight rates between points on the lines of Eastern parties in Official territory, on the one hand, and points in Mountain-Pacific territory (consisting of Transcontinental and Intermountain territories) and points in eastern New Mexico other than those on the Texas-New Mexico Railway, on the other hand, hereby executes and becomes a party to said agreement as of its said date.

/s/ .....

By.....(Title)

IN WITNESS WHEREOF, this agreement has been executed as of the 29th day of September, 1965, by the following carriers:

Eastern Parties:

.....

By.....

.....

By.....

.....

By.....

.....

By.....

.....

By.....

**Western Parties:**

.....

By.....

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By.....

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By.....

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By.....

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By.....

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By.....

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By.....

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By.....

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By.....

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By.....

.....

By.....

.....

## Appendix I (Revised)

## EASTERN PARTIES

| *Name of Carrier* | *Name and Title of Officer Who Executed Counterpart* |
|---|---|
| The Akron, Canton & Youngstown Railroad Company | W. E. Henry<br>Vice President—Traffic |
| Algers, Winslow and Western Railway Company | John W. Scales<br>Traffic Manager |
| The Ann Arbor Railroad Company | E. A. Walther<br>Vice President—Traffic |
| Arcade and Attica Railroad Corporation | R. I. Cartwright, President |
| Aroostook Valley Railroad Company | H. E. Powell, Vice-President |
| Atlantic Coast Line Railroad Company | Philip J. Lee, Vice-President |
| The Baltimore and Annapolis Railroad Company | R. Edwin Disharoon, President |
| Baltimore and Eastern Railroad Company | A. J. Greenough, President |
| The Baltimore and Ohio Railroad Company | Charles J. Henry, Jr.<br>Vice President |
| Bangor and Aroostook Railroad Company | L. W. Wentworth<br>General Freight Traffic Manager |
| Bath and Hammondsport Railroad Company | N. R. Emilson<br>Executive Vice President |
| Beech Mountain Railroad Company | Charles O. Morris, President |
| Belfast and Moosehead Lake Railroad Company | Wilfred I. Hall<br>General Manager and Auditor |
| Bellefonte Central Railroad Company | G. E. McClellan<br>Executive Vice President |
| Bessemer and Lake Erie Railroad Company | G. A. Squibb<br>Vice President—Marketing |
| Boston and Maine Corporation | P. J. Mullaney, Vice President |
| Boyne City Railroad Company | A. J. Sevener, Auditor |
| Brooklyn Eastern District Terminal | M. M. McClelland<br>President and General Manager |
| Bush Terminal Railroad Co. | John C. Hilly, President |
| Cadillac & Lake City Railway Company, Inc. | H. H. Noble<br>President and General Manager |
| Cambria and Indiana Railroad Company | C. L. Doroff, Vice President |

| *Name of Carrier* | *Name and Title of Officer Who Executed Counterpart* |
|---|---|
| Canadian National Railways (Lines West Fort William, Ont., Armstrong, Ont., and East thereof) | G. R. Johnston, Assistant Vice-President—Freight Sales |
| Canadian Pacific Railway Company (Stations in Maine and Vermont) | J. M. Roberts Vice-President—Traffic |
| Central Indiana Railway Company | C. V. Sheriff Vice President—Traffic |
| The Central Railroad Company of New Jersey | J. L. Barngrove, Jr. Vice President—Freight Traffic |
| Central Vermont Railway, Inc. | C. A. Berube, Vice-President |
| The Chesapeake and Ohio Railway Company | J. E. Doyle, Vice President |
| Chesapeake Western Railway | H. H. Pevler, President |
| Chestnut Ridge Railway Company | S. A. Borger, President |
| Chicago & Illinois Midland Railway Company | J. E. Dare, President |
| Chicago South Shore and South Bend Railroad | F. H. Hiskes General Traffic Manager |
| The Cincinnati, New Orleans and Texas Pacific Railway Company | R. S. Hamilton Vice President |
| Claremont and Concord Railway Company, Inc. | K. H. Lemnah Vice President—Traffic |
| The Clarendon and Pittsford Railroad Company | E. W. Olson President |
| Coudersport & Port Allegany Railroad Company | Morris H. Snerson Vice President & Treasurer |
| The Dansville and Mount Morris Railroad Company | F. A. Hart President |
| The Delaware & Hudson Railroad Corporation | J. P. Hiltz, Jr. President and General Manager |
| The Detroit and Toledo Shore Line Railroad Company | F. R. Bette Traffic Manager |
| Detroit, Toledo and Ironton Railroad Company | E. A. Walther Vice President—Traffic |
| East Jersey Railroad and Terminal Company | T. P. Connelly Vice President |
| East Washington Railway Company | J. Mayo Rector, President |
| Erie-Lackawanna Railroad Company | H. C. Schmidt, Vice President |
| Ferdinand Railroad Company | S. A. Schreiner President and General Manager |
| Fonda, Johnstown and Gloversville Railroad Company | Howard C. Miller Vice President & Treasurer |
| Fore River Railroad Corporation | Clinton D. Arnot, President |

| *Name of Carrier* | *Name and Title of Officer Who Executed Counterpart* |
|---|---|
| Genesee and Wyoming Railroad Company | John N. Kiefer, Jr., Vice President and General Manager |
| The Grafton and Upton Railroad Company | Paul Roberts, Treasurer |
| Grand Trunk Railway System (Lines in the United States, East of the West Bank of the Detroit and St. Clair Rivers), comprising the following carriers: Canadian National Railway Company | George R. Johnston, Assistant Vice President—Freight Sales |
| Grand Trunk Western Railroad Company | L. B. Freeman General Traffic Manager |
| Green Mountain Railroad Corporation | R. W. Nimke, General Freight Agt. |
| Greenwich & Johnsonville Railway Company | J. P. Hiltz, Jr. President and General Manager |
| Hoboken Shore Railroad | J. H. Lerbs, President and General Manager, By J. M. Craig, Assistant Manager |
| Hoosac Tunnel and Wilmington Railroad Company | K. H. Lemnah Vice President—Traffic |
| Illinois Terminal Railroad Company | Wm. A. Nelson, Jr. Vice President—Traffic |
| Indiana Harbor Belt Railroad Company | R. N. Cramer, Asst. Vice President |
| The Ironton Railroad Company (Lehigh Valley Railroad Company and Reading Company, Lessees). | R. A. Brobst, General Agent |
| The Kanawha Central Railway Company | F. R. Summerfield, Treasurer |
| Lackawanna and Wyoming Valley Railway Company | M. G. McInnes, President |
| Lake Erie, Franklin & Clarion Railroad Company | W. R. Glenn, Vice President—Traffic & Accounting |
| The Lehigh and Hudson River Railway Company | H. W. Quinlan President and General Manager |
| Lehigh and New England Railway Company | J. L. Barngrove, Jr. Vice President—Freight Traffic |
| Lehigh Valley Railroad Company | G. R. Wallace Vice President—Traffic |
| Livonia, Avon & Lakeville Railroad Corporation | R. G. Nugent, General Manager |

| *Name of Carrier* | *Name and Title of Officer Who Executed Counterpart* |
|---|---|
| The Long Island Rail Road Company | M. C. Marquet<br>General Manager—Freight |
| The Lorain & West Virginia Railway Company | H. C. Wyatt, President |
| Louisville and Nashville Railroad Company | W. G. Whitsett<br>Vice President—Traffic |
| The Lowville and Beaver River Railroad Company | L. K. Virkler, Superintendent |
| Ludington and Northern Railway Co. | Donald C. Englund<br>Traffic Manager |
| Maine Central Railroad Company | R. C. Merrow, Freight Traffic Manager |
| Maryland and Pennsylvania Railroad Company | C. L. Amrein, Vice President and General Manager |
| Middle Fork Railroad Company | Howard D. Loudin, Vice President |
| Middletown and New Jersey Railway Company Inc. | Lloyd R. Deubler<br>Vice President-General Manager |
| Midway Railroad Company | J. L. McNealey, President |
| Monon Railroad | William C. Coleman, Jr., Vice President Traffic and Marketing |
| The Monongahela Railway Company | Hewitt Biaett, President |
| Montour Railroad Company | G. M. Smith, President |
| Montpelier and Barre Railroad Company | K. H. Lemnah, Vice-President —Traffic |
| Morehead and North Fork Railroad Company | Roy H. Cassity, President and General Manager |
| Morristown & Erie Railroad Company | Andrew L. Cobb, III, President |
| Moshassuck Valley Railroad Company | Fred A. Kosierowski, Controller |
| Mount Hope Mineral Railroad Company | J. L. Barngrove, Jr., Vice President—Freight Traffic |
| The Narragansett Pier Railroad Co., Inc. | J. Anthony Hannold, President |
| The New Jersey and New York Railroad Company | Horace Banta, Trustee |
| New Jersey, Indiana & Illinois Railroad Company | R. N. Woodall, Vice President Traffic Manager |
| The New York and Long Branch Railroad Company | P. M. Shoemaker, President |
| The New York Central Railroad Company | James R. Sullivan, Vice-President —Marketing |
| The New York Connecting Rail Road Company | A. J. Greenough, President |

| *Name of Carrier* | *Name and Title of Officer Who Executed Counterpart* |
|---|---|
| New York Dock Railway | Edward Mosca, Vice-President |
| The New York, New Haven and Hartford Railroad Company, (Richard Joyce Smith, William J. Kirk and Harry W. Dorigan, Trustees) | C. E. Ragland, Vice-President —Freight Traffic |
| New York, Susquehanna and Western Railroad Company | T. B. Dwyer, Vice President —Traffic |
| Norfolk and Western Railway Company | R. N. Woodall, Vice President —Traffic |
| Norfolk, Franklin and Danville Railway Company | H. H. Pevler, President |
| Norfolk Southern Railway Company | Henry Oetjen, President |
| Northampton and Bath Railroad Company | F. W. Okie, President |
| Norwood & St. Lawrence Railroad Company. | M. J. Walsh, Jr., President |
| Pennsylvania and Atlantic Railroad Co. | John V. Francis, President |
| The Union Transportation Co., Lessees | |
| The Pennsylvania Railroad Company | H. W. Large, Vice President —Traffic |
| Pennsylvania-Reading Seashore Lines | David E. Smucker, Vice President |
| The Pittsburgh and Lake Erie Railroad Company | James R. Sullivan, Vice President —Marketing |
| The Pittsburg & Shawmut Railroad Company | W. E. Buhite, President |
| Pittsburgh, Chartiers & Youghiogheny Railway Company | C. D. Buford, President |
| Port Huron and Detroit Railroad Company | J. F. Levin, Vice President —Sales |
| Quebec Central Railway Company | G. E. Benoit, Vice President |
| Rahway Valley Company | George A. Clark, President |
| Raritan River Rail Road Company | P. M. Shoemaker, President |
| Reading Company | H. M. Mulloy, Vice President |
| Richmond, Fredericksburg and Potomac Railroad Company | W. E. Turner, Vice President— Traffic & Industrial Development |
| Rosslyn Connecting Railroad Company | J. D. Morris, President |
| St. Johnsbury and Lamoille County Railroad | L. A. Putnam, President |

| *Name of Carrier* | *Name and Title of Officer Who Executed Counterpart* |
|---|---|
| Seaboard Air Line Railroad Company | J. P. Derham, Jr., Vice President |
| Skaneateles Short Line Railroad Corporation | T. Dean Howland, President |
| South Brooklyn Railway Company | S. Brandes, Vice President |
| Southern Indiana Railway, Inc. | W. L. Elder, President |
| Southern New York Railway Incorporated | Morris H. Snerson, Secretary |
| Southern Railway Company | R. S. Hamilton, Vice President |
| Springfield Terminal Railway Company | W. H. Holland, President |
| The Staten Island Rapid Transit Railway Company | Charles J. Henry, Jr., Vice President |
| Stewartstown Railroad Company | J. H. Ebaugh, Secretary |
| The Toledo, Angola & Western Railway Company | Worth Loomis, Vice President & Secretary |
| Toledo, Peoria & Western Railroad Company | Mallory J. Craig, Vice President —Traffic |
| Trenton-Princeton Traction Company | H. M. Mulloy, Vice President |
| Twin Branch Railroad Company | W. J. Rose, Vice-President & Secretary |
| Vermont Railway, Inc. | S. A. Clifford, Vice President |
| Virginia Blue Ridge Railway | R. C. Coco, Vice President |
| Virginia Central Railway | Geo. D. Williams, President |
| Wabash Railroad Company (To the extent of its interest therein) | H. W. Large, Vice President |
| Warwick Railway | Oscar J. Greene, President |
| Washington and Old Dominion Railroad | Gregory S. DeVine, President |
| Waynesburg and Washington Railroad Company | G. M. Smith, President |
| Wellsville, Addison & Galeton Railroad Corporation | Morris H. Snerson, Vice President & Treasurer |
| Western Allegheny Railroad Company | P. W. Nemitz, General Manager |
| Western Maryland Railway Company | C. R. Zarfoss, Vice President |
| West Pittston-Exeter Railroad Company | D. J. Connell, Vice President |
| West Virginia Northern Railroad Company | J. D. Everly, Vice President-General Manager |
| Wharton and Northern Railroad Company | J. L. Barngrove, Jr., Vice President—Freight Traffic |

| *Name of Carrier* | *Name and Title of Officer Who Executed Counterpart* |
|---|---|
| Winchester and Western Railroad Company | George C. Beck, President |
| The Winfield Railroad Company | R. J. Janer, General Traffic Mgr. |
| Winifrede Railroad Company | J. R. Thomas, II, Secretary-Treasurer |
| Youngstown & Southern Railway Company | G. M. Smith, President |

## Revised Appendix II

## WESTERN PARTIES

| *Name of Carrier* | *Name and Title of Officer Who Executed Counterpart* |
|---|---|
| Amador Central Railroad Company | Howard J. Trienens, Attorney |
| The Arcata and Mad River Rail Road Company | Howard J. Trienens, Attorney |
| The Atchison Topeka and Santa Fe Railway Company | T. M. Caiazza, Vice President |
| Butte, Anaconda & Pacific Railway Company | Howard J. Trienens, Attorney |
| California Western Railroad | Howard J. Trienens, Attorney |
| Camas Prairie Railroad Company | Howard J. Trienens, Attorney |
| Camino, Placerville & Lake Tahoe Railroad Company | Howard J. Trienens, Attorney |
| Central California Traction Company | Howard J. Trienens, Attorney |
| Chicago, Burlington & Quincy Railroad Company | G. R. Glover, Vice President |
| The Colorado and Southern Railway Company | G. R. Glover, Vice President —Traffic |
| The Colorado and Wyoming Railway Company | Howard J. Trienens, Attorney |
| The Denver and Rio Grande Western Railroad Company | R. K. Bradford, Senior Vice President |
| Fort Worth and Denver Railway Company | G. R. Glover, Vice President —Traffic |
| Great Northern Railway Company | C. E. Finley, Vice President |
| Gulf, Colorado and Santa Fe Railway Company | Howard J. Trienens, Attorney |
| Holton Inter-Urban Railway | Howard J. Trienens, Attorney |
| Inter-California Railway Company | Howard J. Trienens, Attorney |

| *Name of Carrier* | *Name and Title of Officer Who Executed Counterpart* |
|---|---|
| Klamath Northern Railway Company | Howard J. Trienens, Attorney |
| Longview, Portland & Northern Railway Company | Howard J. Trienens, Attorney |
| Los Angeles Junction Railway Company | Howard J. Trienens, Attorney |
| McCloud River Railway Company | Howard J. Trienens, Attorney |
| Magma Arizona Railroad Company | Howard J. Trienens, Attorney |
| Missouri-Kansas-Texas Railway Company | F. J. Heiling, Vice President |
| Modesto and Empire Traction Company | Howard J. Trienens, Attorney |
| Nevada Northern Railway Company | Howard J. Trienens, Attorney |
| Nacozari Rail Road Company | Howard J. Trienens, Attorney |
| Northern Pacific Railway Company | E. M. Stevenson, Vice President —Traffic |
| Northwestern Pacific Railroad Company | Howard J. Trienens, Attorney |
| Oregon, California & Eastern Railway Company | Howard J. Trienens, Attorney |
| Oregon Electric Railway Company | Howard J. Trienens, Attorney |
| Oregon Pacific and Eastern Railway Company | Howard J. Trienens, Attorney |
| Oregon Trunk Railway | Howard J. Trienens, Attorney |
| Pacific Coast R.R. Co. | Howard J. Trienens, Attorney |
| Pacific Electric Railway Company | Howard J. Trienens, Attorney |
| Panhandle and Santa Fe Railway | Howard J. Trienens, Attorney |
| Petaluma and Santa Rosa Railroad Company | Howard J. Trienens, Attorney |
| Portland Traction Company | Howard J. Trienens, Attorney |
| Sacramento Northern Railway | Howard J. Trienens, Attorney |
| St. Louis-San Francisco Railway Company | Edward J. Kreyling, Jr., Vice President, Traffic and Industrial Development |
| St. Louis Southwestern Railway Company | Howard J. Trienens, Attorney |
| Salt Lake, Garfield and Western Railway Company | Howard J. Trienens, Attorney |
| San Diego & Arizona Eastern Railway Company | Howard J. Trienens, Attorney |
| Santa Maria Valley Railway Company | Howard J. Trienens, Attorney |
| Sierra Railroad Company | Howard J. Trienens, Attorney |
| Southern Pacific Company | W. G. Peoples, Vice President |

| *Name of Carrier* | *Name and Title of Officer Who Executed Counterpart* |
|---|---|
| Spokane International Railroad Company | Howard J. Trienens, Attorney |
| Spokane, Portland and Seattle Railway Company | Howard J. Trienens, Attorney |
| Stockton Terminal and Eastern Railroad | Howard J. Trienens, Attorney |
| Sunset Railway Company | Howard J. Trienens, Attorney |
| The Texas Mexican Railway Company | W. L. Webber, Traffic Manager |
| Tidewater Southern Railway Company | Howard J. Trienens, Attorney |
| Tijuana and Tecate Railway Company | Howard J. Trienens, Attorney |
| Toledo, Peoria & Western Railway Company | Mallory J. Craig, Vice President —Traffic |
| Tooele Valley Railway Company | Howard J. Trienens, Attorney |
| Trona Railway Company | Howard J. Trienens, Attorney |
| Tucson, Cornelia and Gila Bend Railroad Company | Howard J. Trienens, Attorney |
| Union Pacific Railroad Company | J. R. MacAnally, Vice President —Traffic |
| Utah Railway Company | Howard J. Trienens, Attorney |
| Ventura County Railway Company | Howard J. Trienens, Attorney |
| Visalia Electric Railroad Company | Howard J. Trienens, Attorney |
| Walla Walla Valley Railway Company | Howard J. Trienens, Attorney |
| The Western Pacific Railroad Company | Walter C. Brunberg, Vice President—Marketing |
| Yakima Valley Transportation Company | Howard J. Trienens, Attorney |
| Yreka Western Railroad Company | Howard J. Trienens, Attorney |

## Appendix 3

## DESCRIPTION OF EASTERN GROUPS E-1 TO E-6, INCLUSIVE

### EASTERN GROUP E-1

Group E-1 includes all points in New England-Trunk Line Seaboard territory taking Division Group E-1 as named in Section 2 of TEA-ER Division Sheet No. 510, including stations of the Erie-Lackawanna Railroad Company from Jersey City, N. J., to and including Suffern, Spring Valley, and Nyack, N. Y., and to Wanaque-Midvale, Dover and Gladstone, N. J.

### EASTERN GROUP E-2

Group E-2 includes all points in Interior Trunk Line (Syracuse) territory taking Division Group E-2 as named in Section 2 of TEA-ER Division Sheet No. 510 (except Erie-Lackawanna Railroad stations included in Group E-1).

### EASTERN GROUP E-3

Group E-3 includes all points in the Buffalo-Pittsburgh-Bessemer-Cleveland Groups taking Division Group E-3 as named in Section 2 of TEA-ER Division Sheet No. 510.

### EASTERN GROUP E-4

Group E-4 includes all points in the Detroit-Indianapolis-Cincinnati Groups taking Division Group E-4 as named in Section 2 of TEA-ER Division Sheet No. 510.

### EASTERN GROUP E-5

Group E-5 includes all stations in Illinois on lines of Eastern parties.

### EASTERN GROUP E-6

Group E-6 includes Evansville, Terre Haute, and Vincennes, Ind.

## Appendix 4

Eastern Divisional Percentages of Joint Rates Between the Western Group and Groups E-1 to E-6, inclusive, as Provided by Foregoing Agreement.

---

### Primary Break-Points or Gateways

| Eastern Groups | (1) Chicago | (2) Peoria | (3) East St. Louis |
|---|---|---|---|
| E-1 | 32.5% | 36.0% | 36.5% |
| E-2 | 26.5 | 30.0 | 30.5 |
| E-3 | 19.5 | 23.0 | 23.0 |
| E-4 | 15.5 | 19.0 | 19.0 |
| E-5 | 10.0 | 10.0 | 10.0 |
| E-6 | 14.0 | 14.0 | 14.0 |

(1) Includes Chicago group junctions and other junctions grouped therewith in TCFB Division Circular No. 62 series, including Kewaunee, Milwaukee, and Manitowoc, Wis., and Mackinaw City, Menominee, and Manistique, Mich.

(2) Includes Peoria group junctions and other Illinois junctions presently grouped therewith in TCFB Division Circular No. 62-B.

(3) Includes East St. Louis group junctions and other Illinois junctions presently grouped therewith in TCFB Division Circular No. 62-B, but not including St. Louis, Mo.

## Appendix 5

Six disputes involve the different interpretation of various provisions of presently applicable division sheets, viz:

1. Minimum proportions east of Chicago, E. St. Louis and other Official Lines' gateways.
2. Divisions on Rough Lumber.
3. Deduction of 3¢ per 100 lbs. at New York piers on eastbound perishables and on citrus to New England.
4. Combination rated traffic.
5. Locals as maximum.
6. Maximum proportions west of Official Lines' gateways on import — export traffic moving through Pacific Coast ports.

## Appendix C

### AGREEMENT

THIS AGREEMENT, made this 19th day of November, 1965, by and between the Chicago & Eastern Illinois Railroad Company, hereinafter referred to as C&EI, and the Mountain-Pacific railroads, plaintiffs and intervening plaintiffs in Civil Action 63-745-EC, S.D. Calif., hereinafter referred to as Western parties,

### WITNESSETH:

WHEREAS, Western parties and Eastern railroads other than the C&EI entered into an agreement dated September 29, 1965 (hereinafter referred to as the September 29 agreement); and

WHEREAS, the parties hereto adopt the recitals set forth in the September 29 agreement;

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

Section A. The parties hereto adopt the provisions of Sections 1 through 7 of the September 29 agreement with the exception that traffic originating or terminating at stations of the C&EI on the C&EI line between and including South Holland, Illinois, and Danville, Illinois, shall be excluded from Eastern Group E-5 and included in Eastern Group E-6, as defined in Appendix 3 of the September 29 agreement. Subject to this exception, the C&EI will join the Divisions Sheet being prepared by Eastern railroads in accordance with Section 8 of the September 29 agreement.

Section B. With respect to transcontinental traffic originating or terminating on the C&EI in Chicago and the Chicago Switching District, on which traffic the C&EI par-

ticipates in the Midwestern portion of the transcontinental service as a carrier between Chicago and E. St. Louis, the division of the C&EI shall be 107 percent of the present merchandise percent, thereby changing the present 11 percent division to 11.8 percent.

Section C. In compliance with the provisions of Section 7 of the September 29 agreement, the C&EI shall notify the Interstate Commerce Commission forthwith that the C&EI withdraws its opposition to the "Petition for Vacation of Orders" filed by the Eastern and Mountain-Pacific railroads on October 20, 1965, and that the C&EI joins the said "Petition for Vacation of Orders" and requests the deletion of item (b) of the exceptions set forth in the prayer to that Petition. In further compliance with Section 7 of the September 29 agreement, the parties hereto shall join in petitions requesting that the Commission vacate any other outstanding orders affecting any of the divisions agreed to herein.

IN WITNESS WHEREOF, this Agreement has been executed as of the 19th day of November, 1965.

Chicago & Eastern Illinois Railroad Co.

By .....
By James H. Durkin, Attorney

Mountain-Pacific Railroads (plaintiffs and intervening plaintiffs Atchison, T. & S.F. Ry. Co. et al., Southern Pacific Co. et al, and Amador Central R. Co., et al., in Civil Action No. 63 C 745 EC, S.D. Calif.)

By .....
By Howard J. Trienens, Attorney

## Appendix D

## ORDER

SERVICE DATE
JANUARY 17, 1966

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of January, A.D. 1966.

No. 31503*

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

*It appearing,* That by reports and orders of March 21, 1963, 321 I.C.C. 17, (as clarified by order of June 20, 1963) and December 31, 1963, 322 I.C.C. 491, the Commission prescribed (1) in appendices B and B-1 thereof divisions of joint interterritorial rates on transcontinental traffic moving between official (or eastern) and transcontinental territories (including Montana), and (2) in appendices C and C-1 thereof (a) the midwestern subdivisions of the western primary divisions of interterritorial rates between

* This order also embraces Docket No. 31503 (Sub-No. 1), Ahnapee & Western Railway Company et al. v. Abilene & Southern Railway Company et al., No. 31503 (Sub-No. 2), Chicago, Burlington & Quincy Railroad Company et al. v. Abilene & Southern Railway Company et al., No. 31503 (Sub-No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Same, No. 31503 (Sub-No. 4), Louisville & Nashville Railroad Company v. Akron, Canton & Youngstown Railroad Company, et al., and No. 31503 (Sub-No. 5), Cincinnati, New Orleans & Texas Pacific Railway Company v. Same.

official and transcontinental territories prescribed in appendices B and B-1 and (b) the primary divisions of joint intraterritorial rates on traffic moving between midwestern and mountain-Pacific territories, to become effective on July 1, 1963, and, as modified, on March 30, 1964, respectively.

*It further appearing,* That the western railroad petitioners herein thereafter filed an action in the United States District Court for the southern District of California, Central Division, docketed as Civil Action No. 63-745-EC, to set aside, enjoin, annul, and suspend the orders of the Commission described above and said court issued a restraining order on June 27, 1963, and judgments of interlocutory injunction on August 6, 1963, and March 24, 1964, respectively, enjoining *pendente lite* the said orders of the Commission, subject to specified conditions.

*It further appearing,* That the said District Court on February 17, 1965, made its judgment setting aside said orders and remanded the cause to the Commission for further proceedings, and contemporaneously made and entered its orders staying judgment for 60 days from said date, and, if within that period a notice or notices of appeal to the Supreme Court were filed, until final disposition or termination of such appeal or appeals; and providing that during the said period or periods the judgment for interlocutory injunction should continue in full force and effect.

*It further appearing,* That within the said 60 days period notices of appeal were filed in the Supreme Court of the United States and were thereafter docketed as Nos. 143, 159, and 576, October Term, 1965, now pending.

*It further appearing,* That the aforesaid orders of the Commission thus did not become effective as made and that these orders have at all times been and still are under continuous restraint.

*It further appearing,* That by an agreement dated September 29, 1965, the eastern railroad petitioners and western railroad petitioners as shown in revised appendices I and II to their petition filed on October 20, 1965, have agreed upon divisions of joint rates on freight traffic between points on the petitioning Eastern lines and points in mountain-Pacific territory to be applied in lieu of the divisions prescribed by the said orders of the Commission.

*And it further appearing,* That an agreement was made on November 19, 1965, by and between the Chicago & Eastern Illinois Railroad Company and the mountain-Pacific railroads as to the divisions of joint rates on transcontinental traffic involving the participation of the Chicago & Eastern Illinois Railroad Company and, accordingly, the latter railroad has withdrawn its opposition to the granting of the relief here sought.

Upon consideration of the record in the above entitled proceedings and of a petition filed on October 20, 1965, for leave to file under Rule 1.101(e) of the General Rules of Practice a joint petition attached to said petition by the eastern railroad petitioners named in revised appendix I and by western railroad petitioners named in revised appendix II seeking a partial vacation of the said orders of March 21, 1963, and December 31, 1963, and of the replies thereto, the supplemental statements filed in connection therewith, the withdrawal of opposition to the said petition by the Chicago & Eastern Illinois Railroad Company by its telegram dated November 20, 1965, and the letter dated November 22, 1965, by the petitioners consenting to the deletion of item (b) of the exceptions to the prayer of the said joint petition, and for good cause appearing:

*It is ordered,* That the petition for leave to file said petition be, and it is hereby, granted; and upon consideration of said petition for partial vacation of the outstanding

orders herein, said petition be, and it is hereby, granted, therefore:

*It is further ordered,* That the orders of March 21, 1963 (as clarified by order of June 20, 1963), and December 31, 1963, insofar as those orders prescribe primary divisions of joint all rail interstate rates for the transportation of property between points in official (or eastern) territory, on the one hand, and on the other, points in mountain-Pacific territory, as provided in appendices B and B-1 to the said reports of the Commission accompanying said orders to the extent that such joint rates apply from and to points on the lines of the petitioning eastern railroads named in revised appendix I and in addition the Chicago & Eastern Illinois Railroad Company, and points on the lines of petitioning western railroads named in revised appendix II, except (1) insofar as said orders prescribe divisions of joint rates (a) to or from stations in mountain-Pacific territory on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and (b) to or from stations on western and southern railroads in Group E-5 as defined in said reports, and (2) insofar as said orders prescribe in appendices B and B-1 of said reports primary divisions of joint interterritorial rates on traffic moving between official and transcontinental territories from which prescribed western primary divisions the subdivisions thereof accruing to the midwestern lines are determined as provided in appendices C(d) and C-1(d) of said reports, be, and they are hereby, vacated.

*And it is further ordered,* That in all other respects the said orders as modified shall remain unchanged until further order of the Commission.

By the Commission.

H. NEIL GARSON
*Secretary*

(SEAL)

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ORIGINAL

Nos. 143, 159 and 576

Office-Supreme Court, U.S.
FILED
FEB 15 1966
JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1965

| | |
|---|---|
| THE BALTIMORE AND OHIO R. Co., *et al.*, *Appellants*, vs. THE ATCHISON, TOPEKA AND SANTA FE RY. Co., *et al.*, *Appellees.* | No. 143 |
| CHICAGO AND NORTH WESTERN RY. Co., *et al.*, *Appellants*, vs. THE ATCHISON, TOPEKA AND SANTA FE RY. Co., *et al.*, *Appellees.* | No. 159 |
| UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*, vs. THE ATCHISON, TOPEKA AND SANTA FE RY. Co., *et al.*, *Appellees.* | No. 576 |

On Appeal from the United States District Court for the Southern District of California, Central Division

## Motion to Affirm

MARY MORAN PAJALICH
RODERICK B. CASSIDY
J. THOMASON PHELPS
CYRIL M. SAROYAN
State Building
San Francisco, California 94102
*Attorneys for Intervening Plaintiffs-Appellees, the People of the State of California and the Public Utilities Commission of the State of California*

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Nos. 143, 159 and 576

# In the Supreme Court of the United States

OCTOBER TERM, 1965

| | |
|---|---|
| THE BALTIMORE AND OHIO R. CO., *et al.*, *Appellants*, vs. THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.* | No. 143 |
| CHICAGO AND NORTH WESTERN RY. CO., *et al.*, *Appellants*, vs. THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.* | No. 159 |
| UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*, vs. THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.* | No. 576 |

On Appeal from the United States District Court for the Southern District of California, Central Division

## Motion to Affirm

Intervening plaintiffs-appellees, the People of the State of California and the Public Utilities Commission of the State of California, pursuant to Rule 16 of the Revised

Rules of the Supreme Court of the United States, move that the judgment of the District Court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

## STATEMENT

This case is a direct consequence of the extraordinary population, industrial and agricultural growth of the West, and particularly of the State of California, during the past four decades. This Western development has in part been responsible for similarly profound economic changes in other parts of the nation, particularly in the Northeast, where the long established industrial monopoly has been broken and companies encouraged to move westward. American railroads have been profoundly affected by this modern industrial revolution, primarily because of the enormous investment in facilities and equipment necessary to provide rail service. In the West, although railroads found their gross revenues increasing, they found the need for new investment in facilities and equipment to meet the needs of the expanding West increasing while their net operating income remained static. By contrast, Eastern and Midwestern railroads were faced with a substantial loss of revenue and over-capacity as a result of the loss of population and industry to the West combined with the lessening of the Northeastern control over nationwide markets. This divisions case represents an effort by the Eastern and Midwestern railroads to off-set the losses incurred as a result of the industrial shift to the West by obtaining increased percentages of transcontinental freight rates.

A primary issue before the Interstate Commerce Commission was the relative situations of the Eastern, Midwestern and Mountain-Pacific railroads with respect to "the

amount of revenue required to pay the railroads' respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation," which is one of the factors which Section 15(6) of the Interstate Commerce Act requires the Commission to consider. Each group of railroads before the Commission contended that this revenue needs factor weighed heavily in its favor. The Eastern and Midwestern railroads claimed greater revenue needs on the theory that the loss of population and industry to the West had left them with lower rates of return than the Mountain-Pacific railroads; the Mountain-Pacific railroads claimed greater revenue needs because the extraordinary growth of the West had imposed such enormous investment responsibilities upon them that despite their somewhat higher rates of return, they had less money available for distribution to their stockholders than either of the other groups of railroads. As representatives of the public interest, the People of the State of California and the California Public Utilities Commission supported the position of the Mountain-Pacific railroads that the proper measure of revenue needs was the actual needs of the railroads to meet their public responsibilities, not merely the nominal rates of return which they happened to realize. Accordingly, we asked the Commission to determine the basic revenue needs issue in light of the different investment responsibilities faced by the railroads in the various parts of the country by calculating the revenue needs of each group of railroads in terms which took this difference into account.

In its reports, the Commission agreed that relative revenue needs was the primary factor to be taken into account in making divisions of the revenues involved in this case (B&O J.S. 95a), but it then proceeded to order increases

in the divisional shares of the Eastern and Midwestern railroads, without finding either what the revenue needs of the various groups of railroads actually were, or the effect its new divisional order would have upon the Mountain-Pacific railroads which were to bear the brunt of the increases ordered for both the East and the Midwest. The United States District Court for the Southern District of California set aside these orders of the Commission, and these appeals followed.

## ARGUMENT

The district court set aside the Commission's orders on the ground, among others, that the Commission's treatment of the issue of relative revenue needs failed to comply with applicable statutory standards. And these appeals, which because of intervening settlement agreements, are being actively pressed only by certain Midwestern railroads and by the Commission on their behalf, challenge the district court's determination principally as it relates to that ground. But it is manifest that the questions presented by appellants with respect to the issue of relative revenue needs are so unsubstantial as not to need further argument.

### I. The District Court Properly Set Aside the Commission's Orders for Failure to Resolve the Basic Revenue Needs Issue in the Case.

The district court rejected appellants' contention that by findings stated wholly in terms of rates of return and freight income excluding passenger deficits, the Commission had fully discharged its duty under Section 15(6) to give due consideration to the relative revenue needs of the carriers involved (B&O J.S. 19a-20a). This holding was plainly correct, and, indeed, in view of the issues raised by the parties in the proceedings before the Commission,

absolutely necessary under the explict requirements imposed upon the Commission by Section 8(b) of the Administrative Procedure Act to make findings sufficient to resolve all the material issues presented to it.

As stated above, the basic revenue needs issues before the Commission grew out of the vastly different economic situations in which the various groups of railroads involved here found themselves. The Eastern railroads and, to a somewhat lesser extent, the Midwestern railroads, are overbuilt in terms of the present economies of the regions which they serve. The Mountain-Pacific railroads, on the other hand, serve a region which faces a critical need for additional transportation facilities.* The basic revenue needs issues before the Commission related to the problem of deciding just what the actual needs of the railroads involved were. Were there substantial differences in the investment responsibilities of the various groups of railroads? To what extent were the Eastern and Midwestern railroads' operations affected by overcapacity? To what extent did the Mountain-Pacific railroads face a need for making expenditures without any prospect of recovering such expenditures through increased revenues in order to bring the level of rail service in the West up to that already enjoyed in the East?

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*This difference is shown by uncontroverted evidence in the record, having been expressly admitted by the Eastern and Midwestern railroads themselves. The president of the New York Central Railroad testified, for example:

> "You have to contract facilities today in the East rather than expand them." (Tr. 1486).

The Pennsylvania railroad witness agreed that Eastern roads have "shrinking plants" (Tr. 381-382, 9830). The contraction of railroad plant in the East and Midwest is exemplified by Pennsylvania's program to eliminate thousands of miles of track (Ex. T-336, p. 37; Tr. 9830-31), the New York Central's program for eliminating mileage of "unnecessary tracks" (Ex. T-106, p. 20) and the Chicago & North Western Railway's program for abandonment of line and other elimination of excess track (Ex. T. 350, pp. 17-19; Ex. MW-453).

The Commission failed utterly in its duty to resolve these issues. Although the revenue needs issues presented by the parties could only be resolved by consideration and evaluation of the actual needs of the various groups of railroads in the particular differing economic situations in which they operated, the Commission made no findings at all related to such matters. Instead, it merely reviewed the rates of return of the various groups of railroads and compared their theoretical earnings as freight carriers, by excluding their respective passenger deficits,* without even trying to determine by any rational standard just what the revenue needs of the various groups of railroads actually would be. The Commission simply shrugged off this part of its responsibility (B&O J.S. 96a):

> "We are unable to agree with the defendants and the interveners that the public interest warrants increases in the divisions of the mountain-Pacific railroads in order to provide a source of investment funds required for enlarged facilities commensurate with industrial development in that region. The railroads in all sections of the country are faced with the continuing necessity of raising funds for additions and betterments and new equipment, and we cannot recognize any difference in the degree of this urgency among the territorial groups."

Before the district court, these interveners pointed out that this cryptic pronouncement did not satisfy the requirements of Section 8(b) of the Administrative Procedure Act. The uncontroverted evidence before the Commission showed a wide difference between the investment needs of the railroads serving California and those serving the Eastern

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*As pointed out below (p. 13), this passenger deficit theory represented an independent error of the Commission, which the district court quite properly condemned, and upon which the district court's judgment could, if necessary, be independently sustained.

areas where industry was declining and the railroad system was already overbuilt, and the Commission did not deny this.* Why then did the Commission refuse to recognize this difference in determining the revenue needs of the carriers? The Commission's reports simply do not disclose the answer to this critical question. Accordingly, interveners presented the following issue to the district court, which was included as Issue No. 19 in the stipulated List of Issues Remaining in Controversy prepared by the parties at the direction of the district court.

> 19. Whether plaintiffs' and intervening plaintiffs' claim that differences in requirements for investment funds for equipment and facilities commensurate with industrial development in the territories served by the respective carriers should be considered in determining revenue needs was a material issue within the meaning of Section 8(b) of the Adminsitrative Procedure Act; and, if so, whether the Commission stated findings and conclusions, as well as the reasons or basis therefor, upon such issue?

The district court resolved this issue by holding that the issue was material and, therefore, that "findings must be made as to the amount of revenue, *in terms of dollars,* required by the respective carriers affected in any new divisions prescribed . . ." (B&O J.S. 20a) (emphasis supplied). Appellants criticize this holding that revenue needs findings must be made in terms of dollars (C&NW J.S. 16-20; J.S. 15-18), but no effort is made to suggest any other standard for measuring revenue needs which would have resolved the basic revenue needs issues before the Commission. Certainly, the contention that rates of return are in themselves adequate—which contention is the only one appellants

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*Indeed, elsewhere in its report, the Commission affirmatively and explicitly recognized the different economic and transportation conditions in the various parts of the country (B&O J.S. 72a-73a).

have made, either before the district court or in their jurisdictional statement here—is demonstrably unsound. The whole revenue needs issue presented to the Commission was to what extent rates of return had to be adjusted to measure actual revenue needs. A recital of group average rates of return certainly does not resolve that issue.

The district court was thus eminently correct in holding that the Commission had to go further in order to fulfill its duty in this case. Section 8(b) of the Administrative Procedure Act unequivocally requires that the Commission make findings on all material issues before it. Since the revenue needs issue was not only material but critical under the view the Commission chose to use as the basis of its decision here, it was imperative that its findings on that issue be stated in terms which would rationally resolve the controversy between the parties. We do not suggest that the Commission was under a statutory obligation to decide the merits of the revenue needs issue in the precise way we contended for. But it was under an obligation to decide the question, and it could not lawfully simply shrug it off.

Appellants' attempt to have the Court disregard the absence of findings by the Commission, and, in effect, substitute its own findings by approving a report which does not resolve the basic issues before the Commission should therefore be rejected.

## II. The District Court's Decision in No Way Interferes with the Administration of Section 15(6).

Appellants' second main ground of attack upon the holding below is their claim that the district court has made Section 15(6) of the Interstate Commerce Act unworkable for any practical purpose by requiring the Commission to make findings which show that the standards of Section 15(6) have been observed with respect to each of hundreds of carriers involved in this case (C&NW J.S. 11-16; U.S. J.S. 10-13). There is no substance whatever to this claim.

The district court's holding rests principally upon the ground that the Commission's findings were inadequate with respect to the carrier *groups*. This was the principal issue before the district court. Indeed, this was the only issue presented by these interveners, for, as representatives of the public, our concern was not with any particular railroad but with the ability of the whole group of railroads which serve California to meet the transportation needs of the people of our State. Our position, both before the Commission and before the district court, was that although the Commission unquestionably had the ultimate power under Section 15(6) to decide this controversy in the national interest, it was also bound by that Section to give due consideration to the interests of people of the West and to dispose of their arguments only on the basis of rational findings. This the Commission plainly failed to do.

As the district court held (B&O J.S. 12a), it is axiomatic that, whatever the basis of an order prescribing divisions may be, the effect of that order must be known and found as a prerequisite to its validity. This is so, in the first place, because, unless the Commission considers and determines on an individual basis the proper division of each joint rate at issue—a wholly impractical possibility never attempted by the Commission—the soundness of its ultimate order will inevitably depend in substantial part upon the overall effect of that order. Whether the Commission chooses to base its decision upon relative costs alone, or relative revenue needs, some other factors permitted by Section 15(6), or any combination of these factors, the Commission cannot measure its order against the factor or factors chosen without

knowing just what its order does. The Commission must know and find what any contemplated order would do to the revenues of the railroads involved before it can begin to perform its plain statutory duty.

In a case such as this one, where the Commission actually relied upon relative revenue needs to support its orders, the need for such findings is even clearer. A change in divisions on asserted grounds of revenue needs, without knowledge of the amount being transferred to the Eastern and Midwestern railroads, does not tell us whether the alleged revenue needs of those roads are being met. It cannot be ascertained whether the increased divisions would or would not be in excess of the contributions which transcontinental freight traffic ought to make to the Eastern and Midwestern roads.

The Commission violated this principle here. It nowhere found, and, indeed, denied that it has any responsibility to find, the actual financial impact of those orders. Nor did the Commission find what the impact of the orders should be. Thus, the Commission's decision was that the Eastern and Midwestern railroads should have an indeterminate increase in their divisions to reflect relative costs and relative revenue needs. And the Commission's orders prescribed an increase in those divisions—also indeterminate both in amount and in relationship to the basic decision of the commission. This process was plainly irrational and unlawful.

How would this transfer affect the revenue needs of the Western railroads? Would it impair the financial ability of these lines in performing their service obligations and meeting the needs of the public in their own territory? The revenue effect of the Commission's order must be determined so as to make the above determinations.

The Commission asserted at page 76 of its Original Report (dated March 21, 1963) that "Under the requirement of

the public interest that all essential parts of the transportation system be maintained, so far as possible, in effective working condition, we believe that there should be increases in the complainant's divisions reflecting revenue need . . ." This was an ultimate finding, and, as such, it is sound only if, "Every issue that must be resolved to reach that ultimate finding" has itself been resolved by findings. *California Motor Transport Co. v. Public Utilities Commission,* 59 Cal. (2d) 270, 273, 379 P.(2d) 324, 326 (1963).

In this case, the Commission's ultimate finding on the revenue needs issue was wholly without support in essential underlying findings of fact. There was no finding identifying the particular transportation needs which it is necessary to protect by transfer of divisional revenues. There was no finding of the amount of revenue necessary to accomplish the objective required by the public interest. The resulting substantial change in revenues of the Mountain-Pacific lines would inevitably have a substantial effect upon the ability of those lines to meet the transportation needs of the public. Would this change help or hurt the overall public interest? This is not ascertainable.

Bearing in mind, always, that as to the Eastern railroads as a whole, transcontinental freight traffic makes up but 6 percent of the total freight traffic, any increase in divisions, in whatever amount, could have little effect on the overall financial condition of those roads and their ability to serve the public. As for the Midwestern lines, only 15 percent of their total freight revenues is received from transcontinental freight traffic. Hence, the increase in divisional revenues to those two groups of roads would be borne by a few principal Mountain Pacific roads who depend for half of their total freight revenues on these divisions. The ability of these Western railroads to serve the rapidly growing areas in the West would be impaired completly out of proportion to the benefit to the total operations of roads in the East and

Midwest. Transcontinental freight traffic is only of minor importance to the financial condition of those roads. The significance of the relative importance of transcontinental freight traffic to the respective groups is that a transfer of divisional revenues from the Western railroads to the Eastern and Midwestern railroads would severely impair their ability to serve the public of the expanding West without producing any real improvement in the financial position of the Eastern and Midwestern lines.

The Commission's reports identified neither the parts of the transportation system which must be maintained in effective working condition through a transfer of divisional revenues nor the amount of revenues required to reach that objective. It is true that the reports stated that there are differences in earning power and that the Eastern railroads are in a less advantageous situation as freight carriers. But these statements rest upon an erroneous passenger deficit theory which none of the appellants even attempts to defend in this Court. In addition, these statements were highly generalized and made no effort actually to identify and evaluate the needs of the Eastern and Midwestern railroads even under the Commission's erroneous theories.

The parties, in the district court and now in this Court, are thus left to guess as to the effect of the Commission's orders and the relationship between those orders and the Commission's basic decision that the transcontinental divisions should reflect the broader aspects of revenue need. The People of the State of California think it plain that something more is required of the Commission in a case involving the public interest to the extent this case does. In any case where the issue before the Commission is the amount of revenue which a carrier should get from one part of its business in order to insure a just contribution to its

overall revenue needs, an absolute prerequisite to rational, lawful decision is a determination as to the amount of the overall needs and the amount of the transfer that should be made to meet those needs. Since the Commission is compelled by law to decide the controversies before it only in a rational and lawful way, such a determination should have been made here.

Treated on the basis of carrier groups alone, as appellants insist, the Commission's order is therefore plainly unlawful. The district court also found that three individual railroads had not waived their rights to individual consideration of the special impact of the Commission's order upon their special situations (B. & O. J.S. 19a). This holding, supported by a careful review of the authorities (B. & O. J.S. 19a), hardly warrants the assertions of appellants that compliance with the Administrative Procedure Act will impair the Commission's administration of divisions cases (*e.g.*, U.S. J.S. 18). But whatever the rights of these individual railroads might be, they surely do not detract from the rights of the People of the State of California to a lawful determination of their interest in maintaining the whole transportation system necesssary to the economy of this State.

### III. The District Court Also Properly Held That the Commission's Exclusion of Revenue Needs Reflected in Passenger Deficits Was Unlawful.

The district court was also clearly correct in holding that the Commission must consider "the revenue needs of the carriers from *all* transportation services, including needs represented by passenger deficits" (B. & O. J.S. 20a). Other parties will argue more fully the correctness of the district court's decision on this separate point. It suffices for these appellees to state that the Commission has relied upon the revenue needs of the railroads serving California from all

of their operations, including passenger operations, in requiring increases in California intrastate freight rates. *California Intrastate Rates and Charges,* 302 I.C.C. 189, 192-196 (1957), applying the approach approved by this Court in *King v. United States,* 344 U.S. 254 (1954). Certainly in the absence of findings reconciling such action, the Commission cannot lawfully administer the same statute concerning the same revenue needs of the same railroads by determining revenue needs on one basis in increasing freight rates, and then reducing the divisions of the same railroads on a different and inconsistent basis.

## CONCLUSION

For the foregoing reasons, the Judgment of the district court is clearly correct and no substantial questions for the decision of this Court are presented by these appeals. The Judgment of the district court should be affirmed without argument.

Respectfully submitted,

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*Attorneys for Intervening Plaintiffs-Appellees, the People of the State of California and the Public Utilities Commission of the State of California*

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 143

THE BALTIMORE & OHIO R. CO., ET AL., APPELLANTS

*v.*

THE ATCHISON, TOPEKA & SANTA FE RY. CO., ET AL., APPELLEES

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No. 159

CHICAGO & NORTH WESTERN RY. CO., ET AL., APPELLANTS

*v.*

THE ATCHISON, TOPEKA & SANTA FE RY. CO., ET AL., APPELLEES

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No. 576

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

*v.*

THE ATCHISON, TOPEKA & SANTA FE RY. CO., ET AL., APPELLEES

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*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

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**MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN RESPONSE TO THE SUGGESTIONS OF MOOTNESS AND IN OPPOSITION TO THE MOTIONS TO AFFIRM**

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On February 18, 1965, the district court set aside orders of the Interstate Commerce Commission which

prescribed new bases for dividing joint rail rates between more than 300 railroads performing transcontinental freight services.[1] In the proceeding before the Commission, the carriers had aligned themselves into three geographic groups—Eastern, Midwestern and Mountain Pacific—and the Commission's orders were based on findings as to costs of performance and revenue needs of the three railroad groups. The district court rejected the group findings as inadequate to satisfy the statutory requirements of Section 15(6) of the Interstate Commerce Act. It held that the Commission was required to make individual findings for each railroad with respect to each factor relevant under Section 15(6), including specific revenue needs and the financial impact of the new divisions, in dollar amounts, for each carrier.

In our Jurisdictional Statement, filed on September 15, 1965, No. 576, O.T., 1965, we urged that this decision of the district court was in conflict with this Court's prior decisions and past Commission practice and that it would seriously impair the Commission's power effectively to conduct large rate divisions cases. Accordingly, we asked this Court to note probable jurisdiction. Jurisdictional Statements seeking

[1] One basis fixed the division of joint rates for transportation between Eastern and Mountain-Pacific territories. The other (1) prescribed new divisions between Midwestern and Transcontinental territories, and (2) increased the Midwestern share of joint rates for transportation between Eastern and Transcontinental territories as to which the Midwestern carriers performed intermediate service.

review of the district court's order were also filed by the Eastern carriers (No. 143) and by the Midwestern roads (No. 159).

Subsequent to the filing of these Jurisdictional Statements, the Eastern and Mountain Pacific railroads agreed among themselves to new divisions on transcontinental traffic which called for shares for the Eastern carriers higher than those which the Commission had sought to correct, but somewhat lower than the Commission-prescribed divisions. On January 7, 1966, the Commission granted the petition of the Eastern and Mountain Pacific lines to vacate its prior orders insofar as they prescribed divisions covered by this agreement. As a result, we agree with appellees' suggestion that the appeal in No. 143 is completely moot and that the appeal in No. 576 is moot insofar as it concerns revenue divisions of the agreeing parties.

Contrary to appellees' motion to affirm, however, we believe that the settlement between the Eastern and Mountain Pacific roads does not deprive the appeals in Nos. 159 and 576 of importance, thus making them inappropriate for plenary consideration by this Court. The settlement between the Eastern and the Mountain Pacific roads does not moot the Commission's orders insofar as they prescribe new divisions for the Midwestern roads (see footnote 1, *supra,* p. 2). The legal issues presented by the appeal of the Midwestern roads in No. 159 and the appeal in No. 576, where the United States and the Interstate Commerce Commis-

sion are the appellants, are therefore unaffected.[2] As detailed in our Jurisdictional Statement, the district court's construction of Section 15(6) of the Interstate Commerce Act substantially impairs, and perhaps entirely frustrates, the Commission's ability, in this as well as future cases, effectively to fulfill its duty to prescribe fair rate divisions.[3]

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[2] Some of the Midwestern lines—not, however, including the major Midwestern roads—have entered a settlement agreement with appellees. A petition to vacate appendices C and C1 of the Commission's orders, insofar as they would apply to the divisions of the agreeing Midwestern roads, is now pending before the Commission.

[3] Appellees also contend (Motion to Affirm of Mountain-Pacific carriers, 31–33) that the district court order should be affirmed because of the Commission's failure to consider the revenue requirements represented by passenger deficits. In prescribing new divisions of joint rates, however, the Commission in fact considered the carrier groups' net railway operating income from all services (Jurisdictional Statement of Baltimore and Ohio Railroad Co., 88a–90a, 137a–142a). It observed that although the Mountain-Pacific carriers had experienced greater losses from passenger revenues than either of the other groups during the years 1950–1958, the Eastern and Midwestern lines' net railway operating income from all services was less favorable (B & O J.S. 82a–88a, 141a). Finally, contrary to appellees' assertion, the Commission's order in *Official-Southern Divisions*, 325 I.C.C. 1, 453–454, does not reflect a repudiation of the methods for prescribing divisions which the Commission applied in the instant proceeding. While the Commission's *Official-Southern* order prescribed new divisions between Eastern and Southern carriers on the basis of cost of service and the effect of the new divisions in dollar amounts, its findings were made as to carrier groups and not as to individual lines, as required by the district court in this case.

## CONCLUSION

Probable jurisdiction should be noted in Nos. 159 and 576. The appeal in No. 143 should be dismissed as moot in light of the fact that all of the appealing railroads in that case have reached a settlement with the appellee railroads.

Respectfully submitted.

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MARCH 1966.

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SUPREME COURT, U. S.

No. 143

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# Supreme Court of the United States

OCTOBER TERM, 1965

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THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
*Appellants,*

*v.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

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## MEMORANDUM OF APPELLANTS IN RESPONSE TO SUGGESTIONS OF MOOTNESS AND IN OPPOSITION TO MOTIONS TO AFFIRM

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# Supreme Court of the United States

OCTOBER TERM, 1965

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No. 143

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

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## MEMORANDUM OF APPELLANTS IN RESPONSE TO SUGGESTIONS OF MOOTNESS AND IN OPPOSITION TO MOTIONS TO AFFIRM

---

Appellants The Baltimore and Ohio Railroad Company, *et al.*, hereby respond to the memoranda suggesting mootness filed by appellees The Atchison, Topeka and Santa Fe Railway Company, *et al.*, and the Southern Pacific Company, *et al.*, and to the motions to affirm filed by the appellees the State of California, *et al.*, and the regulatory commissions of the States of

Arizona, *et al.*, insofar as they are directed to this case. Appellants agree with the railroad appellees that this case is moot and should be disposed of in substantially the manner they suggest; for the same reason they oppose the motions to affirm filed by the public bodies.

### I. THE SUGGESTIONS OF MOOTNESS

As set forth at page D-4 of the Santa Fe's memorandum suggesting mootness, the order of the Interstate Commerce Commission of January 7, 1966, vacating to the extent therein provided its earlier orders prescribing primary divisions of joint interterritorial rates between points in Official (or Eastern) territory and points in Mountain-Pacific territory, excepted from such vacation so much of such earlier orders as prescribed primary divisions "(a) to or from stations in mountain-Pacific territory on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, . . . ."

Subsequent to the filing of the memoranda suggesting mootness the appellants became parties to an agreement with Chicago, Milwaukee, St. Paul and Pacific Railroad Company, in accordance with which the parties have jointly petitioned the Commission to modify its said order of January 7, 1966, by deleting therefrom the exception clause quoted above.

A copy of the petition with said agreement attached is reproduced as Appendix A hereto.

As a consequence of the agreements described in and attached to the Santa Fe's memorandum suggesting mootness and the agreement of February 28, 1966, with Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the action of the Commission taken and prayed to be taken in respect thereto, there remains

no outstanding controversy whatever concerning primary East-West divisions. Consequently, the appeal of these appellants from that part of the judgment of the District Court directed to portions of the orders of the Interstate Commerce Commission prescribing primary divisions of joint rates between points in Official (or Eastern) territory and points in Mountain-Pacific territory, has become moot.

### II. THE MOTIONS TO AFFIRM

The motions to affirm filed by intervening plaintiffs-appellees the State of California, *et al.*, and the regulatory commissions of the States of Arizona, *et al.*, run to this case, No. 143, as well as to the related appeals in Nos. 159 and 576. The motions, however, recognize the settlements that have rendered this case moot. (Calif. Motion p. 4; Ariz. Motion p. 3).

Appellants submit that since this appeal has become moot the established practice of this Court, as expounded in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), does not warrant affirmance of the judgment of the court below, insofar as it was challenged by these appellants, but instead calls for reversal or vacation of the judgment and for remand to the District Court with directions to dismiss the complaints insofar as they were addressed to the Commission's prescription of primary East-West divisions.*

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* Since the appeal of the United States and the Interstate Commerce Commission in No. 576 challenges the judgment below in its entirety, it has become partially moot as stated in the railroad appellees' suggestions of mootness, and consequently the order of reversal or vacation should be entered in No. 576 as well as in this case.

WHEREFORE, it is requested that this Court enter an order in this case and in No. 576 reversing or vacating the judgment of the District Court and remanding the case to that court, with directions to dismiss the complaints as moot, insofar as the judgment below and the complaints are directed to portions of the orders of the Interstate Commerce Commission prescribing primary divisions of joint all-rail interstate rates for the transportation of property between points in Official (or Eastern) territory, on the one hand, and on the other points in Mountain-Pacific territory.

Respectfully submitted,

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March 1966

## APPENDIX A

BEFORE THE
INTERSTATE COMMERCE COMMISSION

No. 31503 and Sub Nos.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

**Petition for Modification of Order**

Come now Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter called "Milwaukee," and the Eastern railroads complainants in Docket No. 31503, and respectfully state as follows:

I.

The Commission, by its order dated January 7, 1966, served January 17, 1966, vacated its earlier reports and orders of March 21, 1963 (as clarified by order of June 20, 1963) and December 31, 1963

> "insofar as those orders prescribe primary divisions of joint all-rail interstate rates for the transportation of property between points in official (or eastern) territory, on the one hand, and on the other, points in mountain-Pacific territory, as provided in appendices B and B-1 to the said reports of the Commission accompanying said orders to the extent that such joint rates apply from and to points on the lines of the petitioning eastern railroads named in revised appendix I and in addition the Chicago & Eastern Illinois Railroad Company, and points on the lines of petitioning western railroads named in revised appendix II, except (1) insofar as said orders prescribe

divisions of joint rates (a) to or from stations in mountain-Pacific territory on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, . . ."

II.

The Milwaukee and the Eastern railroads have now entered into an agreement dated February 28, 1966, similar to the agreement dated September 29, 1965, between the Eastern railroads and Western railroads, which latter agreement is referred to in said order of January 7, 1966. Under the agreement of February 28, 1966, the Milwaukee and the Eastern railroads have agreed upon the same primary divisions of joint all-rail interstate rates for the transportation of property between points in Official (or Eastern) territory, on the one hand, and points in Mountain-Pacific territory, including stations on the Milwaukee, on which the Milwaukee performs service within Mountain-Pacific territory as an originating, terminating, or intermediate carrier, on the other hand. A copy of said agreement is hereto attached as Exhibit "A".

III.

Exception clause (1)(a) in said order of January 7, 1966, although properly included therein when the order was issued, should now be deleted in view of the aforesaid agreement of February 28, 1966.

IV.

Petitioners do not intend, by this petition, directly or indirectly, to affect the subdivisions accruing to the Midwestern lines (including the Milwaukee) as provided in Appendices C (d) and C-1 (d) of the Reports and Orders of this Commission of March 21, 1963 (as clarified by order of June 20, 1963) and December 31, 1963.

WHEREFORE, petitioners pray that the order of the Commission herein dated January 7, 1966, be modified by the

deletion therefrom of the exception clause (1) (a) above quoted.

Respectfully submitted,

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J. T. Clark
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Dated: March 1, 1966

EXHIBIT "A"

THIS AGREEMENT, made this 28th day of February, 1966, by and between Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as "Milwaukee," and the Eastern railroads in Official territory, as named in Appendix 1 hereof, hereinafter referred to as "Eastern railroads,"

WITNESSETH:

WHEREAS, by an agreement dated September 29, 1965, the Eastern and Western railroads parties thereto undertook (so far as they could do so as among themselves) to compromise, settle, and dispose of the litigation before the Interstate Commerce Commission and the courts involving the Docket 31503 proceedings described therein and certain related disputes;

WHEREAS, by agreement dated November 19, 1965, the Chicago & Eastern Illinois Railroad Company and the Mountain-Pacific railroads plaintiffs and intervening plaintiffs in Civil Action 63-745 EC, S.D. Calif., adopted with certain exceptions the provisions of the agreement of September 29, 1965;

AND WHEREAS, Milwaukee was not a party to the said agreement of September 29, 1965, or the said agreement of November 19, 1965, but is willing, insofar as it performs service in Mountain-Pacific territory, to accept the obligations and obtain the benefits of said agreements to the extent hereinafter set forth;

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

Section A. The Milwaukee, as to traffic on which it performs originating, terminating, or intermediate service in Mountain-Pacific territory, and Eastern railroads, insofar as they perform service within Official territory, adopt the provisions of Sections 1 through 6 of the agreement of September 29, 1965, and will apply as provided therein the

bases of primary divisions specified therein and in Section A of the agreement of November 19, 1965, to joint rates on such traffic between stations in Mountain-Pacific territory, on the one hand, and stations on the lines of Eastern railroads in Official territory, on the other hand.

Section B. The Milwaukee will become a party to joint divisions sheets with Eastern railroads in such manner and to such extent as will carry out the provisions and purposes of this agreement.

Section C. The parties will join in informing the Commission of this settlement and in petitioning it for an appropriate amendment of its order of January 7, 1966, so as not to except from the vacation therein ordered the prescribed divisions of joint rates "to or from stations in mountain-Pacific territory on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company."

IN WITNESS WHEREOF, this agreement has been executed as of the 28th day of February, 1966.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

By .....
W. W. Kremer
Vice President—Traffic

EASTERN RAILROADS named in Appendix 1 hereof

By .....
Charles S. Baxter
Their Agent in This Behalf

## APPENDIX 1

### Eastern Railroads

The Akron, Canton & Youngstown Railroad Company
Algers, Winslow and Western Railway Company
The Ann Arbor Railroad Company
Arcade and Attica Railroad Corporation
Aroostock Valley Railroad Company
Atlantic Coast Line Railroad Company
The Baltimore and Annapolis Railroad Company
Baltimore and Eastern Railroad Company
The Baltimore and Ohio Railroad Company
Bangor and Aroostock Railroad Company
Bath and Hammondsport Railroad Company
Beech Mountain Railroad Company
Belfast and Moosehead Lake Railroad Company
Bellefonte Central Railroad Company
Bessemer and Lake Erie Railroad Company
Boston and Maine Corporation
Boyne City Railroad Company
Brooklyn Eastern District Terminal
Bush Terminal Railroad Co.
Cadillac & Lake City Railway Company, Inc.
Cambria and Indiana Railroad Company
Canadian National Railways (Lines West Fort William, Ont., Armstrong, Ont., and East thereof)
Canadian Pacific Railway Company (Stations in Maine and Vermont)
Central Indiana Railway Company
The Central Railroad Company of New Jersey
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company
Chesapeake Western Railway
Chestnut Ridge Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago & Illinois Midland Railway Company
Chicago South Shore and South Bend Railroad
The Cincinnati, New Orleans and Texas Pacific Railway Company
Claremont and Concord Railway Company, Inc.
The Clarendon and Pittsford Railroad Company
Coudersport & Port Allegany Railroad Company
The Dansville and Mount Morris Railroad Company

The Delaware & Hudson Railroad Corporation
The Detroit and Toledo Shore Line Railroad Company
Detroit, Toledo and Ironton Railroad Company
East Jersey Railroad and Terminal Company
East Washington Railway Company
Erie-Lackawanna Railroad Company
Ferdinand Railroad Company
Fonda, Johnstown and Gloversville Railroad Company
Fore River Railroad Corporation
Genesee and Wyoming Railroad Company
The Grafton and Upton Railroad Company
Grand Trunk Railway System (Lines in the United States, East of the West Bank of the Detroit and St. Clair Rivers), comprising the following carriers:
  Canadian National Railway Company
  Grand Trunk Western Railroad Company
Green Mountain Railroad Corporation
Greenwich & Johnsonville Railway Company
Hoboken Shore Railroad
Hoosac Tunnel and Wilmington Railroad Company
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company
The Ironton Railroad Company (Lehigh Valley Railroad Company and Reading Company, Lessees)
The Kanawha Central Railway Company
Lackawanna and Wyoming Valley Railway Company
Lake Erie, Franklin & Clarion Railroad Company
The Lehigh and Hudson River Railway Company
Lehigh and New England Railway Company
Lehigh Valley Railroad Company
Livonia, Avon & Lakeville Railroad Corporation
The Long Island Rail Road Company
The Lorain & West Virginia Railway Company
Louisville and Nashville Railroad Company
The Lowville and Beaver River Railroad Company
Ludington and Northern Railway Co.
Maine Central Railroad Company
Maryland and Pennsylvania Railroad Company
Middle Fork Railroad Company
Middletown and New Jersey Railway Company Inc.
Midway Railroad Company
Monon Railroad
The Monongahela Railway Company

Montour Railroad Company
Montpelier and Barre Railroad Company
Morehead and North Fork Railroad Company
Morristown & Erie Railroad Company
Moshassuck Valley Railroad Company
Mount Hope Mineral Railroad Company
The Narragansett Pier Railroad Co. Inc.
The New Jersey and New York Railroad Company
The New Jersey, Indiana & Illinois Railroad Company
The New York and Long Branch Railroad Company
The New York Central Railroad Company
The New York Connecting Rail Road Company
New York Dock Railway
The New York, New Haven and Hartford Railroad Company (Richard Joyce Smith, William J. Kirk and Harry W. Dorigan, Trustees)
New York, Susquehanna and Western Railroad Company
Norfolk and Western Railway Company
Norfolk, Franklin and Danville Railway Company
Norfolk Southern Railway Company
Northampton and Bath Railroad Company
Norwood & St. Lawrence Railroad Company
Pennsylvania and Atlantic Railroad Co.
The Union Transportation Co., Lessees
The Pennsylvania Railroad Company
Pennsylvania-Reading Seashore Lines
The Pittsburgh and Lake Erie Railroad Company
The Pittsburg & Shawmut Railroad Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
Port Huron and Detroit Railroad Company
Quebec Central Railway Company
Rahway Valley Company
Raritan River Rail Road Company
Reading Company
Richmond, Fredericksburg and Potomac Railroad Company
Rosslyn Connecting Railroad Company
St. Johnsbury and Lamoille County Railroad
Seaboard Air Line Railroad Company
Skaneateles Short Line Railroad Corporation
South Brooklyn Railway Company
Southern Indiana Railway, Inc.
Southern New York Railway Incorporated
Southern Railway Company

Springfield Terminal Railway Company
The Staten Island Rapid Transit Railway Company
Stewartstown Railroad Company
The Toledo, Angola & Western Railway Company
Toledo, Peoria & Western Railroad Company
Trenton-Princeton Traction Company
Twin Branch Railroad Company
Vermont Railway, Inc.
Virginia Blue Ridge Railway
Virginia Central Railway
Wabash Railroad Company (To the extent of its interest therein)
Warwick Railway
Washington and Old Dominion Railroad
Waynesburg and Washington Railroad Company
Wellsville, Addison & Galeton Railroad Corporation
Western Allegheny Railroad Company
Western Maryland Railway Company
West Pittston-Exeter Railroad Company
West Virginia Northern Railroad Company
Wharton and Northern Railroad Company
Winchester and Western Railroad Company
The Winfield Railroad Company
Winifrede Railroad Company
Youngstown & Southern Railway Company

END